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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND STATUTES CITED AND CONSTRUED
AND AN INDEX.

By SIDNEY R. MOON,
OFFICIAL REPORTER.

DANIEL W. CROCKETT, First Ass't Reporter.
LEE W. MOON, Second Ass't Reporter.

VOL. 142.

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JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. TIMOTHY E. HOWARD.* †

HON. LEONARD J. HACKNEY.‡ †

HON. LEANDER J. MONKS.‖

HON. JAMES H. JORDAN.‖

HON. JAMES McCABE.†

* Chief Justice at May Term, 1895.

‡ Chief Justice at November Term, 1895.

† Term of office commences January 1, 1893.

‖ Term of office commenced January 7, 1895.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1895, IN THE SEVENTY-
NINTH YEAR OF THE STATE.

No. 15,997.

SATTERWHITE v. THE STATE.

MANDAMUS. — Witness. — Taxes. — Board of Equalization. — Preliminary Examination.—The court has power by mandate to order a witness to answer questions asked him by a board of equalization on a preliminary examination, under R. S. 1881, section 6317, although it cannot direct what answer he shall make.

SAME. — Witness. — Tax Board of Equalization. — Relief.—The fact that a petition by a board of equalization, for a mandamus to compel a witness to testify before it, demands more than the petitioner is entitled to, does not deprive the petitioner of the right to any relief.

TAXES. — Board of Equalization. — Right to examine Books and Papers of Corporations and Banks. — Preliminary Examination. — Notice. — Omitted Property.—A board of equalization has power, under R. S. 1881, section 6317, to inspect and examine the books and papers of corporations, including banks, and require a witness to testify, in making a preliminary examination to determine whether any property has been omitted from taxation, before giving any notice to any tax-payer that the board is about to assess property omitted by him.

From the Morgan Circuit Court.

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A. C. Harris, J. R. Wilson, W. R. Harrison and L. A. Cox, for appellant.

A. G. Smith, Attorney-General, E. S. Davis, J. H. Jordan, F. P. A. Phelps and O. Matthews, for appellee.

HOWARD, J.—From the affidavit and information filed in the court below, it appears that on the 15th day of September, 1890, the Morgan county board of equalization was in session in Martinsville, in said county, investigating according to law, and inquiring into the alleged fact, that divers tax-payers of said county, on the first day of April, 1890, had on deposit in the First National Bank of said city, large sums of money, then and there liable to taxation in said county for said year, which said tax-payers had omitted to report to the assessors, and that the same had not been assessed or taken into account in the assessments made for that year; that said board was, at the same time engaged in making investigation, as to persons who had converted their money into “greenbacks,” for the fraudulent purpose of avoiding taxation thereon; that while in session, as aforesaid, said board subpoenaed appellant, who is the president of said bank, to appear before the board, and bring with him the book of deposits belonging to said bank, and to testify as to matters relating to such investigations; that in obedience to said subpoena appellant did appear before the board with the book of deposits, whereupon the board, for the purpose of aiding it in its said investigations, and not otherwise, demanded that it be permitted to examine said book of deposits; that appellant refused to permit an inspection of said book of deposits by the board, and refused to testify as to the matters aforesaid;—asking that a mandate issue from the court to require appellant to show cause, if any he has, why he refuses to allow the board to inspect said book of de-

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posits, for the purpose aforesaid, or to answer the questions propounded to him, and that upon the final hearing he be ordered to do so.

A demurrer having been overruled to the complaint, the court entered an order requiring appellant to appear before the board of equalization, and “answer as to such questions as may be propounded to him by said board, touching or relating to the said investigation, as to any person or corporation of said county, named or mentioned by said board, who had money or bonds on deposit, or in the custody or control of the First National Bank of Martinsville, Indiana, on the first day of April, 1890, and also that he answer such questions of said board as may be propounded to him as to persons or corporations of said county, who within his knowledge, before the first day of April, converted, or caused to be converted, his or her taxable money into United States notes, called greenbacks, or into other non-taxable securities of the United States, and further, that he permit the said board to inspect and examine the books of the said bank, in his custody and control, in order to ascertain if any person or corporation of said county, that may be mentioned by it, had money, notes or bonds deposited therein on the said first day of April, 1890. All of which is ordered and commanded by the court, in order that the said board may discharge its duties in the premises, in investigating as to what property, if any, belonging to persons and corporations of said county, and owned and held by them on said first day of April, has been omitted from being assessed and returned for taxation for the year 1890. George W. Grubbs, judge.”

In compliance with the order so made, the appellant appeared again before the board of equalization; but, as appears further from the information, he refused to answer the questions as directed in said order, and re-

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fused to permit the board to examine said books of the First National Bank, or to inform the board as to the deposits in said bank, or as to who had changed their deposits into greenbacks to escape taxation, and refused "to answer or show to said board from the books of said bank, the amount of deposits of Willard Parks, and about twenty-five others, or if they had changed their deposits into greenbacks on or about the first day of April, 1890."

On the filing of the affidavit and information, a rule was entered against appellant requiring him to show cause why he should not be punished as for contempt for his refusal to obey the order of the court as heretofore made.

The appellant appeared and demurred to the rule, to show cause ; and on the overruling of his demurrer, answered : first, by a general denial, and, secondly, by a special paragraph.

In the second paragraph of his answer, the appellant averred that he was not, as he believed, guilty of any contempt of court ; that he did not attempt in any way to avoid any proper examination of himself as a witness before the board of equalization ; that he did decline and refuse to disclose the names of persons who had deposits of money in said bank on the first day of April, 1890, or to permit said board to examine said books of said bank, "unless said board would first, by notice to particular persons, as required by the statutes in such cases, begin such proceedings as would give to said board the right and power to equalize, tax and charge with omitted property or money, or increase the value thereof, against the persons thus notified ; that he so refused because he was advised, and in good faith believed, and yet believes that such steps were necessary to be taken before said board had any jurisdiction of such persons, or

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had the power to investigate said matters, and because as to said books of said bank, he had no right, and could not consistently with his duties as an officer of said bank, make such use of said books, or such exposure of its business transactions with such persons, until all preliminary steps made necessary by the statutes governing the matter had been complied with; that if said board shall, by proper notice, begin such proceedings against any person depositing or exchanging taxable for non-taxable paper or money to evade taxation in or with said bank, so as to give said board jurisdiction over such person, and thereby acquire the right to proceed against any such person, defendant will, if required, disclose as to such person all information in his possession, and any facts appearing on the books of said bank as to such person and his transactions with said bank, but his duty to said bank, and the interest of said bank forbid that he should do so under any other condition or circumstances."

A demurrer being sustained to this second paragraph of answer, the cause was submitted to the court upon the complaint and the general denial, and a plea of not guilty by the appellant; and the evidence being heard, the appellant was found guilty of contempt of the court in refusing to obey the order thereof, and was fined in the sum of one dollar. Over a motion for a new trial, judgment was entered accordingly.

It is first contended by appellant that the board had not jurisdiction of the matters of which it made inquiry of him; and that there was therefore no contempt of court in refusing to obey its order, requiring him to answer the questions as set out in its order.

The information upon which the order and rule of court were based, showed that the board was at the time in session investigating and inquiring into the al-

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leged fact that divers tax-payers of the county had on the first day of April previous, on deposit in the bank in question, large sums of money liable to taxation for that year, which had not been reported to the assessors, and had not been listed for taxation.

Among the powers of the board of equalization, given by section 6397, R. S. 1881, as amended by an act approved March 9, 1889, (Acts 1889, p. 367; Ell. Supp., section 2127), were the following: "Power to hear complaints of any owner of personal property, except capital stock, franchises and rolling stock of railroads, to equalize the valuation of property and taxables made subsequent to the preceding first day of April, and to correct any list or valuation as they may deem proper;" also, "power to equalize the valuation made by the assessors, either by adding to or deducting from their valuations, such sums as to said board or a majority thereof, shall appear just and equitable;" and also "power to add and assess omitted property," notice to the owner to be given, as prescribed in the last case. Finally, as held in *State v. Wood*, 110 Ind. 82, to aid the board in the discharge of all these duties, it is further provided that they "may send for persons and papers."

As a further aid to the board in the exercise of the powers enumerated above, and particularly in their making the preliminary investigation and inquiry referred to in the information filed with the court, it was provided in section 6317, R. S. 1881, then also in force, that: "For the purpose of properly listing and assessing property for taxation, and equalizing and collecting taxes, county auditors, auditor of State, and boards of equalization, shall each have the right to inspect and examine the records of all public offices, and the books and papers of all corporations and tax-payers in this State, without charge; and they shall also have power

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to administer all necessary oaths or affirmations in the discharge of their duties.”

It is not easy to see how the statute could have more fully conferred upon the board the power to do what it was attempting to do in this case. “Having these powers,” as said in *State v. Wood, supra*, “it is clearly the duty of the board to exercise them in proper cases.”

It is also well said in that case: “The power to add and assess omitted property, in many cases, would amount to but little, if the board had no power to investigate and determine whether or not property had been so omitted.” And again: “The power to add and assess omitted property carries with it the power to investigate and determine as to whom the property belongs, and whether or not it has, in fact, been omitted from the tax lists of the owner. And the power to make such investigation includes the power to get information from the supposed owner and other witnesses. See Bishop Statutory Crimes, section 137.”

Indeed, the case of *State v. Wood, supra*, substantially decides the chief, if not the sole, controversy in this case, namely: That the board of equalization had the power to investigate and determine whether or not Willard Parks, or any one of the other twenty-five taxpayers, was the owner of money, notes or bonds on deposit in said bank, “which he had not included in his tax lists, and which was, therefore omitted property, and that, in order to make the investigation, it had the power to examine witnesses; and further, that, having such power, it was in the exercise of a duty.”

There is nothing in the contention of counsel, made in support of appellant’s excuse in his second paragraph of answer to the rule to show cause, namely, that no notice had been issued to any tax-payer that the board was about to assess property omitted by him. The board was

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not at the time attempting to assess any such omitted property, as the information shows, but was making a preliminary examination under the statute to determine whether any property was omitted.

Counsel for appellee well remark in this connection, that :

“The board in this case was duly organized, it had the right and power to make a preliminary investigation, to ascertain for its own information, as a basis for further proceedings, if necessary, whether any tax-payer of the county had omitted or concealed property that was subject to taxation, and, in the exercise of this duty, to swear and examine witnesses ; and then, if upon this investigation, it should be determined to proceed further, to give the required notice, and let the individual tax-payer come before the board and be heard in his own defense or explanation. Any other construction of these statutes would be strained and narrow, and defeat both the letter and the spirit of the law.”

It is said that the board was not a court, and could not, therefore, punish for contempt. That was evidently the opinion of the board itself when the information was filed in the circuit court. The court issued its mandate to require the appellant to comply with the provisions of the law, and on his default herein, issued a rule against him to show cause why he should not be punished as for contempt, in refusing to obey the mandate of the court.

The board had authority to make the investigation. It had authority by any member of it to administer the oath to the witness, and it had authority to require him to be sworn and answer as to the matters inquired of him.

“Where the statute,” says Mr. Bishop, *supra*, “gave the king’s justices power ‘to take the oaths’ of persons, it

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carried with it, by intendment, authority to issue their precept, and bring the persons before them to be sworn." *State v. Wood, supra.*

Whether the circuit court had power to require the appellant "to answer generally" the questions propounded by the board, we need not inquire. The very conservative order of the court required only that appellant answer, "as to any person or corporation of said county, named or mentioned by said board;" and that "he permit the said board to inspect and examine the books of the said bank in his said custody and control, in order to ascertain if any person or corporation of said county, that may be mentioned by it, had money, notes, or bonds deposited therein on the said first day of April, 1890."

Nor was this "a public examination," "dragnet," or "prying into the private business" of any one, any more than is any legal listing and assessment of taxes. Such inquiries are always proper on the part of assessing officers, and sometimes necessary, in order to learn what property should be placed upon the tax lists. The inquiries are moreover directly authorized by the statute.

The examination, as said in the order of the court, was to be made solely in order that the board might "discharge its duties in the premises, investigating as to what property, if any, belonging to persons and corporations of said county, owned and held by them on said first day of April, had been omitted from being assessed and returned for taxation for the year 1890."

The law will not presume that the board had a right to send for the witness and ask him proper questions, and yet that he may not be compelled to answer. The court could not direct what answer he should make, but it had the power by mandate to order him to answer.

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Section 1182, R. S. 1894, (section 1168, R. S. 1881), provides that: "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station."

In the case of *Commonwealth v. Commissioners*, 37 Pa. St. 277, it was said: "Mandamus is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public, by officers and others, who either neglect or refuse to perform them. It follows, therefore, that those to whom it may be appropriately directed, owe some duty to the public, and are under obligation to perform it; and for the enforcement of which there is no other specific legal remedy."

The appellant, indeed, did not question the power of the court to issue the order requiring him to appear again before the board and answer the questions as stated in the order, but appeared and demurred, and on the issue of the mandate obeyed it so far as appearing again before the board. The refusal to answer the questions of the board was based solely on the ground that the board had no right to ask them. In this he was mistaken, as we have seen.

The State and the public had a right to the information thus sought to be elicited, and in the manner in which it was sought, in order to secure general and uniform assessment and taxation of all property.

The judgment is affirmed.

JORDAN, J., was absent during the consideration and decision of this case.

Filed May 2, 1895.

ON PETITION FOR REHEARING.

HOWARD, C. J.—In their petition and brief for a rehearing of this appeal, counsel for appellant have, as we think, sought to build up a case outside the record, and on that vantage ground they have attempted to show that the opinion of the court is erroneous. Were the board of equalization in the case before us proceeding to assess any omitted property, much of what counsel say might be in point. From the information, however, we learn that the board was in session, “investigating according to law, and inquiring into,” the alleged fact that divers tax-payers had omitted property from assessment. Counsel do not deny that the board had, in fact, the power to add and assess omitted property; but they contend that before any such property shall be added to the list and assessed, notice must be given to the owner. To this we agree entirely. But, as already cited from *State v. Wood, supra*: “The power to add and assess omitted property carries with it the power to investigate and determine as to whom the property belongs, and whether or not it has, in fact, been omitted from the tax lists of the owner. And the power to make such investigation includes the power to get information from the supposed owner and other witnesses.” The business in which the board was engaged in the case before us, was not in assessing omitted property, but in finding out whether there was any omitted property.

Counsel take a strange position in practically assuming that there can be no such preliminary examination. The property of all other tax-payers may be inquired into, from themselves or from any other witnesses, preliminary to listing the same for taxation; and no good reason can be given why depositors in banks should form an exception to the rule. If on such examination there

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should be any indication that any person's property had been omitted from the assessment lists, then is the time when the board may notify him to appear and show, if it be true, that such property has in fact not been omitted, or that no such property is in existence. If there be no preliminary examination, it may well be that the board might never learn whether any property was omitted; or, if there was any such omission, they might never learn who is the owner. All rights are saved to the owner, provided there be no assessment of the property until he has received notice to attend and be heard. He cannot complain because the board sees fit to exercise its statutory right to first try to find out whether any property has probably or possibly been omitted.

We think also that counsel go outside the record when they draw our attention to what information the board originally sought, and what mandate they asked from the court. A plaintiff may ask more than the trial court will give; but the appeal is not from the complaint, but from the judgment. If the judgment was clearly right, it is not material that the plaintiff should have prayed for more than the court saw fit to grant. The decree of the court must be within the pleadings, but it is not necessary that it should give all that is asked; nor will the judgment be erroneous simply for the reason, if it should be so, that the plaintiff had demanded more than he was entitled to.

The order of the court was that the appellant "answer as to such questions as may be propounded to him by said board, touching or relating to the said investigation, *as to any person or corporation of said county named or mentioned by said board.*" The inspection of the books by the board is permitted only to the same extent, namely: "in order to ascertain if *any person or*

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corporation of said county, that may be mentioned by it, had money, notes or bonds on deposit, etc."

The order of the court so made was clearly within the letter and spirit of the statute. Indeed, it would seem that counsel's contention is rather against the statute than against the decision of the court; and if the position of counsel were correct, we are inclined to think they should ask for the overthrow of the statute, (section 6317, R. S. 1881) which expressly provides that "for the purpose of properly listing and assessing property for taxation, and equalizing, and collecting taxes, county auditors, auditor of State, and boards of equalization shall each have the right to inspect and examine the records of all public offices, and the books and papers of all corporations and taxpayers in this State, without charge; and they shall also have power to administer all necessary oaths or affirmations in the discharge of their duties." From appellant's able and earnest briefs one would never think that such a statute as this was in existence at the date of the order violated by appellant. The law, by its very terms, applies to all tax-payers of the State, whether corporations or natural persons; and it is the duty of the courts to apply it as it stands on the statute books.

The petition is overruled.

Filed June 14, 1895.

DISSENTING OPINION.

MCCABE, C. J.—It is to be regretted that the conclusion reached in this case could not be unanimous. But I am constrained to disagree with the conclusion of the majority. It appears from the record, that the alleged contempt consisted of the refusal of the appellant to comply with the order of the circuit court requiring

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him to answer certain questions put to him by the board of equalization of the county, convened in the county commissioners' court room, in Martinsville, in said county of Morgan. Such board had subpoenaed him, when so convened, and propounded certain questions, which he refused to answer. His refusal was made known to the circuit court by an information regularly filed, whereupon a rule was entered, and served upon him, to show cause why he so refused. It appears from his showing, in response to the rule, and from the record, that he was the president of the First National Bank of Martinsville, in said county, duly organized under the laws of the United States; that the board was seeking to find out from him what tax-payers of the county had deposits in said bank on the first day of April, 1890, with a view, if any such were found, of adding such deposits to the list or lists of such tax-payers, in case they had not already been listed for taxation by such tax-payers.

The only law in force at that time under which it is sought to justify the action of the board and the circuit court were section 6317, R. S. 1881, and section 6397, R. S. 1881, as amended by act of March 9, 1889, of our former tax law. Elliott Sup., section 2127. The former section reads as follows: "For the purpose of properly listing and assessing property for taxation, and equalizing, and collecting taxes, county auditors, auditor of State, and boards of equalization shall each have the right to inspect and examine the records of all public offices, and the books and papers of all corporations and tax-payers in this State, without charge; and they shall also have power to administer all necessary oaths or affirmations in the discharge of their duties; and it shall be the duty of every assessor or other officer charged with the duty of listing property for

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taxation, or charged with the duty of collecting taxes, to give, in writing, all information he may acquire in reference to the concealment of property from taxation by any person or corporation before mentioned to county auditors, auditor of State, or boards of equalization aforesaid.”

The amended section 6397 (Elliott's Supp., section 2127) provides, among other things, that such board of equalization shall be composed of the commissioners of the county and four freeholders of the county, to be appointed by the circuit court, to be called the county board of equalization. “The board shall meet, for the purpose of equalization, in the room of the county commissioners, in the court house of each county, on the third Monday of June, annually. Two weeks' previous notice of the time, place, and purpose of such meeting shall be given by the county auditor in some newspaper of general circulation * * * in the county. * * * Such board shall have the power to hear complaints of any owner of personal property, * * and to correct any list or valuation as they may deem proper. It shall also have power to equalize the valuation made by the assessors, either by adding to or deducting from their valuations, such sums as * * * shall appear just and equitable, and in the discharge of this duty may send for persons and papers. Such board shall also have power to add and assess omitted property, * * * or to increase the valuation placed upon property that has been listed for taxation. It shall cause the names of persons to whose lists property is to be added, or the valuation of whose property is to be increased, to be inserted in the notice hereinbefore provided for, * * * or cause to be served upon the person to whose list property is to be added, or the valuation of whose property is to be in-

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creased, a written notice that it is proposed to revise or correct his list. * * * The tax-payer whose list it adjudges shall be revised or corrected as aforesaid, shall be liable for all costs occasioned by such revision or correction."

The only authority conferred on the board by section 6317 is "the right to inspect and examine the records of all public offices, and the books and papers of all corporations and tax-payers in this State without charge," and administer oaths, etc. The power attempted to be exerted in this case is not conferred in the right to inspect and examine the records of all public offices, because a bank is not a public office, nor is the power claimed created in the right to inspect and examine the books and papers of all corporations, because that would confer such right as against incorporated banks and leave unincorporated banks entirely free from such liability. It is obvious that the Legislature never intended to make such a discrimination in favor of unincorporated banks, and therefore had no reference to banks in the use of the word corporations. But in conferring the right to inspect and examine the books and papers of all tax-payers in this State, the right to examine and inspect the books of all banks in the State is necessarily included. But the right to examine and inspect the books and papers of a tax-payer, in my opinion, is given for the sole purpose of enabling the officers and boards of equalization to properly assess and tax the property of such tax-payer and not for the purpose of enabling them to assess and tax other tax-payers' property, or for the purpose of enabling them to discover property of other tax-payers concealed for the purpose of avoiding taxation. Moreover, this right to inspect and examine the records of all public offices and the books and papers of all corporations and tax-payers in this State, evi-

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dently, in my opinion, was never intended to authorize the county boards of equalization to summon the keeper of such books to bring the same before such boards to be inspected. Because that would involve the right of the State board of equalization and the State auditor to summon the clerk of the circuit court and the recorder of the remotest county in the State to the State capitol to bring with them the public records of their respective offices. This is so, because the same words that confer power on county boards and county auditors confer on the State board of equalization and the State auditor the same power or right. It would, it seems to me, be very unreasonable to suppose that the Legislature intended by the language employed to confer the right and power on the auditor of State and the State board of equalization to compel county officers to transport the records of their offices to the State capitol to be examined and inspected by the State board of equalization or the State auditor.

If that is so, it then follows necessarily from the language employed, even if we concede that banks (which cannot be) are included in the word corporations, that they cannot be required to transport their books to any other place for inspection and examination by the boards of equalization, either State or county.

The court does not seem to have made the order comprehensive enough to require the appellant to produce the books of the bank before the board, but did require him to answer all questions the board might ask him as to deposits by any person or corporation of said county named or mentioned by said board, who had money, notes, or bonds on deposit, or in the custody or control of the bank, on the first day of April, 1890, and also that he answer as to persons or corporations of said county who, before the said first day of April, had con-

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verted his or her taxable money into United States notes called "greenbacks," or into other nontaxable securities of the United States, and, further, that he permit said board to inspect and examine the books of said bank in his custody and control.

It does not appear that the board, or any member thereof, ever applied at the bank and requested to be allowed to inspect any book or books or any paper or papers of said bank for any purpose whatever, nor does it appear that any such right was refused at the bank or place of business of such bank by the appellant or any one else. The appellant, therefore, was not guilty of wrongfully refusing the board the right to have the books of the bank produced before them while in session and to have an inspection thereof, even though the board had jurisdiction to carry on the investigation in which they were engaged.

The question then remains, did the appellant wrongfully refuse to answer the questions propounded? That question must be answered by a consideration of the amended section 6397, aboved quoted. It confers three distinct powers on the county board of equalization:

1. To hear the complaints of any owner, etc.
2. To equalize the valuation made by assessors, either by adding to or deducting from their valuations such sums as * * * shall seem just and equitable, and in the discharge of this duty may send for persons and papers.
3. Such board shall also have power to add and assess omitted property * * * where it deems it necessary to add omitted property, or increase the valuation placed upon property that has been listed for taxation.

The power to send for persons and papers, annexed to the second power conferred, namely, to equalize valuations, etc., was held in *State v. Wood*, 110 Ind. 82, to

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apply also to the other two powers, namely, hearing complaints of owners, etc., and hearing cases for adding omitted property and increasing the valuation placed upon property previously listed. No question of want of jurisdiction of the board of equalization for lack of notice to the tax-payer whose list was to be revised was involved in that case.

It is clear that the board was not, in the case before us, engaged in the exercise of the first or second power conferred or duty imposed by the above section, nor is there any claim made that they were so engaged when appellant refused to answer the questions of which the board complained. It remains to be considered whether they were exercising the third power conferred when appellant refused to answer their questions. As we have seen that power was "to add omitted property, or to increase the valuation placed upon property that has been listed for taxation."

The board has no power except such as is expressly conferred by statute and such as is necessarily implied to effectuate the powers expressly conferred. *White v. Conover*, 5 Blackf. 462; *Mossman v. Forrest*, 27 Ind. 233; *English v. Smock*, 34 Ind. 115; *Gavin v. Board, etc.*, 104 Ind. 201. It was not a court, but was clothed with and required to exercise *quasi judicial* powers and duties. *State v. Wood, supra*. The power "to add omitted property, or to increase the valuation placed upon property that has been listed for taxation," carries with it by implication the power to bring before the board any competent evidence of such omission or undervaluation. *State v. Wood, supra*. But this implied power can only be exercised in connection with and incidental to the exercise of the main power to add omitted property or increase the valuation, etc. This power cannot be exercised by them at all without giving the notice

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prescribed by the statute to the person or persons to whose list property is to be added, or the valuation of whose property is to be increased. *Kuntz v. Sumption*, 117 Ind. 1 (2 L. R. A. 655). The second paragraph of the answer states, and the demurrer admits, that no notice had been given to any such tax-payer, nor is any claim made here that there had been such notice given; but it is claimed that the board was engaged in a preliminary investigation to ascertain if any of the depositors in said bank had failed to list their deposits, or rather to ascertain if any taxpayer who had listed no deposits on April 1, 1890, had deposits in said bank at that time; that they had a list of some twenty-five of such about whose deposits they proposed to inquire. The appellant objected to answering as to such inquiries without any person or persons being named against whom it was claimed that they had omitted to list their deposits, or that they had exchanged taxable funds for nontaxable on the ground that no notice had been given to any of such tax-payers of such proposed action. And therefore appellant claimed that the board had no jurisdiction to pursue the investigation. If they did not have such jurisdiction, they had no power to administer any oath to appellant. 18 Am. and Eng. Ency. Law 303, section 2, and authorities there cited; Burns R. S. 1894, section 1816; R. S. 1881, section 1747. This is especially true in this case, because the only power conferred on them in that direction is found in section 6317, above quoted, which is that "they shall also have power to administer all necessary oaths or affirmations in the discharge of their duties." If they had no power to pursue the investigation, it was no part of their duty to pursue it, and hence any oath administered by them therein was without authority, because not administered in the discharge of their duty. If they had no power to admin-

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ister any oath to appellant, any false answers he might have made to questions put to him would not have constituted perjury. 18 Am. and Eng. Ency. Law, *supra*, Burns R. S. 1894, *supra*; *State v. Wood*, *supra*.

If the questions and the investigations they related to were outside of the jurisdiction of the board, then the refusal to answer them was not a contempt. Vanfleet Collateral Attack., section 754, and authorities there cited. Disobedience of an order of court that had no jurisdiction, where there is a want of authority, is not a contempt. 3 Am. and Eng. Ency. Law. 788, section 4, and authorities there cited in note 1. Acting against an erroneous order of the court is not a contempt. 3 Am. and Eng. Ency. Law, section 4, note 2, and authorities there cited.

It does not seem to me that in the absence of a notice to some tax-payer whose tax list is the subject of investigation, there can be any question that the board had no jurisdiction to pursue such investigation, and hence had no power to require appellant to answer any question in relation thereto, and that the circuit court had no authority to require him to do so, any more than if said board had been a body of private gentlemen who took it into their heads to find out all about the private affairs of the bank and its depositors for their amusement or private gain.

But it is sought to be maintained that a preliminary investigation is essential to enable the board to know who to notify of the purpose to revise their tax lists, and my brothers in the prevailing opinion uphold that contention. And it is conceded by the appellees and the prevailing opinion, that such investigation previous to notice cannot result in anything at most beyond furnishing the board information who to serve notice upon with a view of going over the evidence again to revise

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such persons' tax list. The obstacle in the way of this theory is that there is nothing in either section of the statute authorizing the county board of equalization to institute any such preliminary investigation or proceeding in their capacity of a *quasi* judicial body. Besides, it is contrary to all the analogies of the law.

The circuit court, being a court of general and almost unlimited jurisdiction, could exercise no such wonderful power as that claimed and asserted here for this *quasi* judicial body. Many cases are begun in the circuit court which perhaps would never have been begun if the plaintiff could be allowed to institute a preliminary trial or investigation, without being responsible for costs, to find out what the evidence is going to be. Who would claim that such a proceeding could be maintained? In addition to the objection that the circuit court would have no jurisdiction for want of notice to the opposite party, there is the other substantial objection that it authorizes two trials substantially of the same cause, and one of them without jurisdiction or effect. And that is the effect of the holding in the prevailing opinion. It in effect allows two trials of the same matter. One in the absence of the party to be affected and the other in his presence or on notice to him. On the first trial there is no provision made for the payment of the costs thereof, on the second there is. That is an additional reason why the Legislature intended that there should be but the one trial, the one in which the tax-payer is brought in with notice, and in which he is made liable for costs if his list is revised.

But if the theory of the two trials prevails, on the second, when the tax-payer is brought in by notice, all the evidence must be gone over again in his presence and hearing, or the notice to him amounts to nothing more

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than notifying a party after he has been tried without notice to come in and show cause why judgment shall not be rendered against him on the evidence heard in his absence. He does not know what has been proven against him, and hence does not know where to begin or what evidence to introduce. That would be a mockery of justice. But if to this it is answered that such injustice may be obviated by going over the evidence again in his presence, that was introduced against him before the board in his absence, and before he had notice, such answer is not good; because he is made to depend wholly on those unfriendly and whose interests are adverse to him to bring again before the board the same, and all, evidence they heard in his absence. If they fail in this, his case may be lost simply because some adverse item of evidence had been heard by the triers in his absence and of which he was never informed, and which, if he had been correctly informed, he could have met and overcome. Besides, a deal of incompetent evidence might have been adduced on the preliminary investigation in his absence before the triers, where he had no opportunity to keep it out by objection. It has made a lodgment in the minds of the triers; indeed, it has caused them to form and express an opinion as to the merits of the case against him. To offer him a trial then, by even going over all the evidence, looks to me strongly like a mockery of justice. In fact, it is very little better, if any, than letting the board decide against him on the first or preliminary investigation or trial without notice to him at all.

For these reasons I am constrained to withhold my assent to the conclusion reached by my brothers in the prevailing opinion, and to believe that the board had no jurisdiction for want of notice to any tax-payer, and that

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the circuit court erred in attempting to compel the appellant to answer questions touching such investigation; and I am therefore of the opinion that the judgment ought to be reversed.

Filed May 2, 1895.

No. 17,811.

ROOK ET AL. v. WILSON.

WILL.—Devise.—Description.—Title.—A will devising the testator's "real estate to-wit," a specified quarter of a quarter-section, passes the title to another quarter in such quarter-section, where it was the only land owned by the testator.

SAME.—Signature.—Mark.—Wrong Christian Name.—A will signed by the testator by making his mark, and duly probated as his will, is not insufficient because another than his given name is written thereon. (See note at end of opinion.)

From the Jay Circuit Court.

D. T. Taylor, for appellants.

La Follette & Adair and *R. H. Hartford*, for appellee.

HOWARD, C. J.—This was an action brought by appellee against appellants and other defendants to quiet title to certain real estate. A demurrer having been overruled to the complaint, the appellants filed an answer and a cross-complaint. Afterwards, by leave of the court, the answer and cross-complaint were withdrawn, and the appellants stood upon their demurrer. Thereupon, the court, having heard the evidence, found for the appellee, and entered a decree quieting his title to the land in controversy.

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Appellee traces title through mesne conveyances to a warranty deed made by Mary Rook and David Rook, widow and son of Samuel Rook; and the only question to be considered is whether the last will of Samuel Rook authorized David Rook to execute said deed.

It is not questioned that by said will certain land was devised to David Rook, on conditions which were fulfilled by him; that on the death of the testator, in August, 1854, the will was duly proved and David Rook at once went into possession of the land in controversy, claiming ownership under the will; and that he so continued in possession under claim of ownership until the making of the deed under which appellee claims title. It seems also that the title and possession thus acquired remained unassailed for nearly forty years.

It is said, however, that the land described in the will is not the same as that in dispute. The description in the will is: "My real estate, to-wit: The southeast quarter of the southeast of section eight (8), in township No. eight (8) in (22) north, of range twelve (12) east."

Appellee alleged in his complaint that, in this reference to the lands devised, the testator used an erroneous specific description of land which he did not then and at no time thereafter own; but that he did at the time own the land here in dispute, to-wit: "The northeast quarter of the southeast quarter of section eight (8), township twenty-two (22) north, range twelve (12) east;" that the last named land was "the only real estate owned by said Samuel Rook at his death;" and that "the said land '(describing it)' is and was the land referred to in the said will of Samuel Rook, deceased, by the words, 'my real estate.'"

These allegations, being taken as true, were sufficient, as we think, to make the complaint good as against the objection here urged against it. The intention to devise

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the land in controversy, "my real estate," is evident from the whole tenor of the will; and the erroneous description cannot obscure this intention. A similar misdescription in *Cleveland v. Spilman*, 25 Ind. 95, was held insufficient to invalidate a devise. Counsel say that that case was not well considered, and ought not to be followed. The opinion in *Cleveland v. Spilman* was written by one of the ablest judges that ever sat upon this bench; and the case has since been often cited by this court on the point in question, including the recent case of *Priest v. Lackey*, 140 Ind. 399; and we are still of opinion that it should be followed in such a case as that before us. The language of the will shows that the devise was intended to operate upon the land then owned by the testator, which was the northeast, and not the southeast, quarter of the southeast quarter of the section.

Attention is also called to the circumstance that the will is signed "James (his mark X) Rook, testator," and not Samuel Rook, as it should have been. The defect, if it be such, is not discussed by counsel. A similar defect was noticed in the signature to the will in *Cleveland v. Spilman*, *supra*. The will in this case was duly probated as the will of Samuel Rook. Any mark used by the testator to stand for his name and show his assent to the will would be sufficient. See 1 Jarman Wills (6th Am. from 5th Eng. Ed.), pp. *79, 80.

We have carefully considered every question raised in the several able briefs of counsel on both sides, and find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed September 17, 1895.

NOTE.—The authorities on the subject of signature by mark in the execution of wills, or other instruments, are found in an extensive note to *Re Guilfoyle* (Cal.), 22 L. R. A. 370.

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FREEL v. THE SCHOOL CITY OF CRAWFORDSVILLE.

142	27
142	577
143	92
142	27
153	271

SCHOOL CORPORATION.—*Liability for Negligent Acts of Its Officers.—Taxes.—Damages.—Personal Injury.*—A school corporation is not liable for the negligent acts of its officers, where no right of action against it is expressly given by statute, and no provision is made for levying taxes or paying damages for personal injuries.

From the Montgomery Circuit Court.

M. E. Clodfelter, G. D. Hurley and C. L. Thompson,
for appellant.

Paul & Bruner, for appellee.

MONKS, J.—Appellant brought this action to recover for personal injuries sustained by him while in the employment of appellee as a laborer, making repairs on a schoolhouse.

A demurrer was sustained to the complaint, and judgment rendered for appellee.

The only error assigned calls in question the ruling of the court in sustaining the demurrer to the complaint. If appellee is liable to respond in damages for the negligence of its officers or agents, the court erred in sustaining the demurrer to the complaint as the same is otherwise sufficient.

School corporations in this State are a part of the educational system of the State, established in compliance with article 8 of the constitution, sections 182, 187, R. S. 1881 (sections 182, 187, R. S. 1894), which makes it the duty of the Legislature “to provide by law for a general and uniform system of common schools, where tuition shall be without charge and equally open to all.”

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They are involuntary corporations, organized not for the purpose of profit or gain but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. Such corporations are but the agents of the State, for the sole purpose of administering the State system of public education.

It is the duty of the school trustees of a township, town, or city to take charge of the educational affairs of their respective localities, and among other things to build and keep in repair public school buildings. In performing the duties required of them they exercise merely a public function and agency for the public good for which they receive no private or corporate benefit. School corporations, therefore, are governed by the same law in respect to their liability to individuals for the negligence of their officers or agents as are counties and townships.

It is well established that where subdivisions of the State are organized solely for a public purpose, by a general law, that no action lies against them for an injury received by a person on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute. Such subdivisions then, as counties, townships, and school corporations, are instrumentalities of government, and exercise authority given by the State, and are no more liable for the acts or omissions of their officers than the State. *Cones v. Board, etc.*, 137 Ind. 404, and authorities cited; *Board, etc., v. Daily*, 132 Ind. 73, and cases cited; *Morris v. Board, etc.*, 131 Ind. 285, and cases cited.

In *Smith v. Board of Commissioners of Allen Co.*, 131 Ind. 116, this court held that a county was not liable for an injury to a servant, sustained without his fault, while engaged in tearing down one of its bridges, although he works under the immediate charge of its

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agent, who is known to the board of commissioners to be incompetent, which incompetency is the proximate cause of the injury. The case of *Smith v. Board, etc., supra*, is decisive of the questions in this case.

Besides school corporations in this State have no fund out of which such damages can be paid, nor have they any power, express or implied, to raise a fund for such purpose, by taxation or otherwise.

The law specifically states what taxes shall be levied for their benefit, and how and for what the same shall be disbursed, and no provision is made for the payment of damages for personal injuries. This fact alone would be decisive of the question against appellant. *Cones v. Board, etc., supra*, on pages 408 and 409; *O'Leary v. Board of Fire Comm. etc.*, 79 Mich. 281, (7 L. R. A. 170), 19 Am. St. Rep. on pages 172 and 173. Certainly a public corporation is not liable to respond in damages in any instance for the negligence of its officers or agents unless it has the authority to raise the money from the tax-payers to pay the same. The officer, agent, or other person whose negligence was the proximate cause of the injury may be liable, but appellee is not. The decisions in other states fully sustain the views here expressed. *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Goddard v. Inhabitants of Harpswell*, 84 Me. 499, 30 Am. St. Rep. 373, and note on pages 398 and 402; *Dosdall v. County of Olmsted*, 30 Minn. 96, 44 Am. Rep. 185; *Howard v. Worcester*, 153 Mass. 426, (12 L. R. A. 160), 25 Am. St. Rep. 651; *Downing v. Mason Co.*, 87 Ky. 208, 12 Am. St. Rep. 473; 2 Thom. on Negl., 698; *Hill v. City of Boston*, 122 Mass. 344, 23 Am. St. Rep. 332; *Barnes v. District of Columbia*, 91 U. S. 540; *Wixon v. City of Newport*, 13 R. I. 454, 43 Am. Rep. 35; *Barnett v. County of Contra Costa*, 67 Cal. 77; *Finch v. Toledo Board of Education*, 30

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Ohio St. 37, 27 Am. Rep. 414; *Lane v. Township of Woodbury*, 58 Iowa 462; *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Hollenbeck, Admx., v. County of Winnebago*, 95 Ill. 148, 35 Am. Rep. 151; *Bigelow v. Inhabitants of Randolph*, 14 Gray (Mass.) 541; *Kincaid v. Hardin Co.*, 53 Iowa 430, 36 Am. Rep. 237; *Ford v. School District of Kendall Borough*, 121 Pa. St. 543, 1 L. R. A. 607; *Templeton v. Linn Co.*, 22 Ore. 313, and cases cited; *Bailey v. Lawrence County (S. D.)*, 59 N. W. Rep. 219; 1 Beach Pub. Corp., sections 734 and 739, note 1; 15 Am. and Eng. Ency. of Law, page 1143, and authorities cited in note 1; 1 Shear. & Redf. on Negl., section 267.

There is no error in the record.

Judgment affirmed.

Filed September 17, 1895.

No. 17,566.

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142 30|
148 543|

ASSIGNMENT OF ERRORS.—*Causes for New Trial.*—Alleged errors, which are merely causes for a new trial, cannot be assigned as independent errors on appeal.

From the Lake Circuit Court.

B. Dolan, for appellants.

W. A. Ketcham, Attorney-General, for State.

JORDAN, J.—The appellants were charged with, and convicted of, the crime of robbery, and sentenced to be imprisoned in the State's prison for a term of three years. In this court they have assigned errors substantially as follows:

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“1. Error of law occurring at the trial, in this: that the court erred in allowing witness, Constantine Engler, to give evidence against Edward Wolf, charging him with the commission of a felony other than the one with which he was charged, etc.

“2. That the court erred in allowing counsel for the State to make statements in the presence of the jury, charging Edward Wolf with the commission of a similar crime, etc.

“3. Newly discovered evidence.

“4. The verdict of the jury is contrary to the evidence.”

These are the only errors that counsel for appellants have attempted to assign. It is well settled by numerous decisions of this court, that alleged errors which are merely causes for a new trial in the lower court, cannot be assigned in the Supreme Court as independent errors.

In order to have presented the errors assigned to this court for review, appellants should have first properly presented them to the trial court by a motion for a new trial, and the action of that court in overruling the motion should have been assigned as error. *Wagner v. State*, 63 Ind. 250; *Allen v. State*, 74 Ind. 216.

No question being presented for our consideration upon the merits of this appeal, the judgment is affirmed.

Filed September 17, 1895.

No. 17,499.

CITY OF SOUTH BEND v. MARTIN.

MUNICIPAL CORPORATION.—*City*.—*License*.—*Hawkers and Peddlers*.

—A city has power to pass an ordinance, requiring a license to hawk and peddle therein, under R. S. 1894, section 3541, empowering cities to “restrain” hawking and peddling.

142	31
142	697
142	31
157	178
142	31
161	250
161	280

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SAME.—*License.*—*Hawkers and Peddlers.*—*Interstate Commerce.*—An ordinance imposing a license on hawkers and peddlers, does not interfere with interstate commerce in the case of a peddler of chairs imported into the State before his employment begins, even though the sale by him is conditional and the title remains in the foreign owner.

PEDDLER.—*Definition of.*—*License.*—*Municipal Corporation.*—*City.*—One engaged in selling chairs within a city by going personally from house to house, selling the chairs and delivering them at the time of the sale, is a peddler within an ordinance requiring peddlers to obtain a license.

From the St. Joseph Circuit Court.

W. Ward, for appellant.

J. G. Orr, for appellee.

MCCABE, J.—The appellant prosecuted the appellee before the mayor of said city, to recover the penalty of not less than \$1.00 nor more than \$20.00 provided in an ordinance, with a violation of which the appellee was charged in the verified complaint filed. Said complaint charged “that the defendant, on the 12th day of September, 1894, at the city * * * aforesaid, violated sections Nos. 24 and 25 of the ordinance No. 938 of said city, passed by the common council thereof on the 11th day of December, 1893, and amended August, 1894, by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend, by carrying, exposing, offering and crying for sale articles of merchandise, to-wit: rattan rocking chairs, in the public streets and avenues of said city, without having a license for that purpose. That while so engaged, the defendant sold and delivered to one Emma Wright one rattan rocking chair for the sum of six dollars. That said articles of merchandise so sold were not newspapers, nor produce, nor provisions, and that said sales were not for future delivery of said chairs. That defendant is

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not a wholesale traveling merchant." The city recovered judgment in the mayor's court for one dollar, and the defendant appealed to the circuit court, where a trial resulted in a judgment for the defendant. The plaintiff appeals therefrom to this court. One of the questions presented by the record and briefs is whether the ordinance referred to is valid. That alone rescues the appeal from the exclusive jurisdiction of the appellate court. Acts 1891, p. 39; R. S. 1894, section 1331. The only error assigned is that the circuit court overruled appellant's motion for a new trial. The ground of the motion for a new trial is that the decision of the court was contrary to law and the evidence.

The only evidence in the cause was the following agreed statement of facts: "A. H. Ordway & Company are manufacturers of rattan chairs, residing in South Framingham, Mass., of which State they are citizens, and in which city they have their manufactory and place of business. In the prosecution of the said business they sell directly to the people of the different States, and do not sell to retail dealers in the trade. They ship their chairs from the factory to A. H. Ordway & Company, in care of their agents at different points throughout the United States."

In the prosecution of their said business, they employ men who go about from town to town in Indiana and other States of the union with the chairs, going personally from house to house, and selling the chairs on the installment plan, retaining the title in the chairs until they are fully paid for, and deliver the goods at the time the sales are made.

The defendant, William C. Martin, was an employe of the said A. H. Ordway & Company, employed by them to travel and sell their chairs in the manner stated,

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upon a commission on the amount of his sales, at the time of his arrest, September 13, 1894.

The particular chairs, in which defendant was engaged in selling in South Bend, Indiana, at the time of his arrest, were shipped by the owners and manufacturers, A. H. Ordway & Company, from South Framingham, Mass., to A. H. Ordway & Company, in care of their agent at Chicago, State of Illinois, where they have a branch and repository, and there reshipped from Chicago to South Bend, Indiana.

The defendant, William C. Martin, at the time of his arrest, and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city, and selling the chairs and delivering the same at the time of sale, and was acting solely for A. H. Ordway & Company, and the said sales were made on the installment plan, and title retained in A. H. Ordway & Company until the same are fully paid for. The common council of the city of South Bend had enacted an ordinance, in force at the time of the arrest of the said William C. Martin, entitled :

“An ordinance concerning the licensing of certain extraordinary trades and establishments. Passed December 11, 1893. Amended August 28, 1894.” Section 24 of said ordinance provides as follows: “It shall be unlawful for any person to carry on the business of hawking and peddling within the corporate limits of South Bend, at wholesale or retail, by carrying, exposing or crying for sale, within any street, avenue, alley or public square of said city, or otherwise, any article of commerce without a license from said city for that purpose; Provided, this section shall not apply to the sale of newspapers, nor to produce and provisions, nor fruit of peddlers’ own raising, nor to taking orders for future deliv-

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ery of any kind of goods, wares or merchandise, nor to wholesale traveling merchants, and farmers, who sell only retail dealers in like commodities.

“Any person violating any section of this ordinance, shall be fined, for each offense, not less than one dollar, nor more than twenty dollars.

“Section 25.—License to hawkers and peddlers shall be signed by the mayor and countersigned, registered and delivered to the applicant by the clerk, on payment of a license fee as follows: For carrying goods by hand, one dollar per day, five dollars per week, ten dollars per month and twenty dollars per year. For selling from any kind of vehicle, two dollars per day, eight dollars per week, fifteen dollars per month, twenty-five dollars per year. The clerk for such services shall receive fifty cents for each license issued to be paid by the applicant.

“Section 26.—No license issued under any section of this ordinance shall be transferable, nor shall any person other than the person named in the license, be permitted to use the same, nor shall any license protect any person from incurring the penalties prescribed by this ordinance, except the licensee named in the license.”

The defendant, William C. Martin, at the time of his arrest, was not engaged in the sale of newspapers, produce, provisions or fruit, and was not taking orders for future delivery, and was not a wholesale traveling merchant, but was selling at retail to consumers. The defendant, at the time of his arrest, had not obtained a license, as required by said ordinance. The defendant was arrested, tried, convicted and sentenced to pay a fine of \$1.00 and costs, under said ordinance, before D. B. J. Schafer, mayor of said city of South Bend, September 13, 1894. If the court should be of the opinion, upon the facts stated, that the defendant was liable to pay the license fee provided by said ordinance, then

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judgment to be rendered for the plaintiff for one dollar (\$1.00) and costs of suit. If the court should be of opinion that the said Martin was not liable to pay, then judgment to be entered for the defendant for costs of suit.

Subdivision 23 of section 3106, R. S. 1881 (R. S. 1894, section 3541), empowers cities "To regulate the ringing of bells and crying of goods, and to restrain hawking and peddling."

It has been held by this court that this statutory provision empowers a city to pass an ordinance requiring a license to hawk and peddle in a city. *City of Huntington v. Cheesbro*, 57 Ind. 74.

The ordinance involved in *Grafty v. City of Rushville*, 107 Ind. 502, imposed a penalty on "every person who peddles, hawks, sells, or exhibits for sale, any goods, wares, or merchandise, not the growth or manufacture of Rush county, Indiana, or shall take orders for any such goods, wares or merchandise, for immediate or future delivery, about the streets, alleys, hotels, business houses, private dwellings, or at any public or private place in said city," without a license, was held void, both because it violated section 23 of article 1 of the State constitution, which provides that: "The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms shall not equally belong to all citizens," and because of its plain repugnance to the federal constitution, which commits to congress the exclusive power to regulate commerce among the several States. The provision in that ordinance that brought it in conflict with both constitutions, in the opinion of the court, was its discrimination against "any goods, wares or merchandise, not the growth or manufacture of Rush county, Indiana." Grafty had been taking orders from citizens of said city for shirts, socks,

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and men's furnishing goods, about the streets, etc., of said city, which were not of the growth or manufacture of said Rush county. That he resided in Indianapolis, and was in the employ of Paul H. Krauss, a manufacturer and dealer in such goods, residing and having his business house in the city of Indianapolis. That Grafty's manner of business was to carry samples of the different articles manufactured or sold by his employer, and exhibit them from house to house to individuals, not dealers, soliciting orders from each individual for such articles, and in such quantities, as the individual might require or purchase. The goods thus ordered were to be delivered at a future day, by express, or otherwise; he delivered no goods, nor did he carry any goods with him, except the samples.

It is easy to see that as against Grafty this ordinance under the facts was an infringement of the provision quoted from the State constitution, but it is difficult to see how, under those facts, it violated any provision of the federal constitution. It is also easy to see that a case might arise on a different state of facts that would make the ordinance void as to that case, because of its infringement of the federal constitution. For instance, had the manufacturer and dealer in these goods been a resident of another State, and had his business house there, his goods then would have been the legitimate subject of interstate commerce, and Grafty would have been engaged in interstate commerce, the exclusive power to regulate which is vested by the federal constitution in the Congress of the United States. But the facts in that case show that Grafty was not engaged in interstate commerce, but that he was engaged in *intra*-state commerce, that his commerce and trade, and by which, it was charged, he violated the ordinance, were entirely confined within the boundaries of the State of

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Indiana, the power to regulate which has never been delegated by the federal constitution to Congress, but has been retained by, and belongs to, the several States. The case, however, rightly decided that the ordinance was void because of its infringement of the State constitution, but not as an infringement of the federal constitution, under the facts of that case. It will be observed that the ordinance now before us makes no discrimination, but applies to all, without regard to residence, or the place from whence the goods come.

Two questions arise under the assignment of errors, and the contention of counsel :

1. Was the business of the appellee, conducted in the manner described in the complaint and the agreed facts, within the prohibition of the ordinance against hawking and peddling?

2. Was the ordinance in question a valid exercise of the power vested in the city by the statute referred to?

The answer to both questions depends to some extent upon the answer to the question, what is hawking and peddling? Because it is that that the city is authorized to restrain ; and requiring a license was held to be a restraint on such business in *City of Huntington v. Cheesbro*, *supra*. In *Grafty v. City of Rushville*, *supra*, it was said: "The extent of the power conferred upon cities by the statute, in this connection, is to restrain hawking and peddling, and any mode of selling which does not legitimately fall within these terms, cannot be made unlawful by being specially described, and restrained in the ordinance. Such sales and exhibitions of wares, and such orders for the future delivery of goods, and such only as are embraced by the terms, hawking and peddling may be restrained by ordinances duly passed under the power conferred by the statute above set out."

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We must, therefore, inquire and ascertain what constitutes a hawker and a peddler. This court in the case last referred to adopted the definition of Chief Justice Shaw in *Commonwealth v. Ober*, 12 Cush. 493, which definition has been adopted by many courts, among them the Supreme Court of the United States in *Emert v. Missouri*, 156 U. S. 296. It was said by Chief Justice Shaw that: "The leading primary idea of a hawker and a peddler is that of an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this (though perhaps not essential), by a hawker is generally understood one who not only carries goods for sale, but seeks for purchasers either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish."

Webster defines peddling as traveling about and selling small wares, and hawking as offering for sale in the streets by outcry. Another definition also adopted by this court in the case referred to, and by the Supreme Court of the United States in the case referred to, runs thus: "A peddler, petty chapman, or other trading person going from town to town or to other men's houses, and traveling either on foot, or with horse or horses, or otherwise carrying to sell, or exposing to sale, any goods, wares, or merchandise." Rapalje and Lawrence Law Dic. Tit. Hawker.

This court and the Supreme Court of the United States in the cases mentioned quote with approval another definition found in the various law dictionaries,

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showing the disfavor in which the common law held the vocation, as follows: "Hawkers. Those deceitful fellows, who went from place to place buying and selling brass, pewter, and other goods and merchandise, which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with hawks seize their game where they can find it. * * Hawkers and peddlers, etc., going from town to town, or house to house, are now to pay a fine and duty to the king."

The purpose and policy of the statute in empowering cities to pass ordinances in restraint of hawking and peddling was probably two fold. One and the principal object to be attained was the protection and encouragement of local dealers and merchants, who are largely dependent for their patronage on their reputation for integrity and fair dealing, and their social and moral standing in the community; and who, by investing their means, providing fixed places of trade, and paying taxes on their merchandise help to build up and maintain the city in which they reside, and contribute to the support of its schools and other local interests and enterprises.

The other was to prevent the indiscriminate invasion of the houses and places of business of citizens, and shield them from the practices of itinerant traders of unknown repute, who may be frequently patronized by persons, in order to be rid of their importunities and presence. Under these definitions of hawking and peddling, the city was amply empowered to enact the ordinance in question. The police power vested by the statute in the city may be properly exerted to restrain all such as by their methods of doing business, are liable to invade social order, or injuriously affect the prosperity of the city, by seeking purchasers for their wares in the houses of citizens, or in the streets or public places

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of a city to the discouragement of the more legitimate methods of others, on whom the municipality is dependent for its support.

In *Grafty v. City of Rushville, supra*, it was said :
“Any method of selling goods, wares or merchandise by outcry on the streets, or public places in a city, or by attracting persons to purchase goods exposed for sale at such places, by placards or signals, or by going from house to house, selling or offering goods for sale at retail to individuals not dealers in such commodities * * * constitutes the person so selling a hawker or peddler within the meaning of the statute. In this way we are brought to the conclusion that the appellant's method of conducting business was within the prohibition against hawking and peddling without being duly licensed.”

The same is true in the case now before us.

The next question is, was the ordinance in question a valid exercise of the power vested in the city by the statute? The answer to that question depends upon whether the ordinance violates or infringes any of the limitations of the constitution, State or federal. It is not claimed that it violated any provision of the State constitution or infringes any of its provisions. This is practically conceded by the appellee. But he contends earnestly that it infringes that provision of the federal constitution which vests in Congress the power to regulate commerce with foreign nations and among the several States.

It is contended that the business of the appellee, and the manner in which it was conducted, as shown by the agreed statement of the facts, made it interstate commerce, and, therefore, beyond the control of the State authorities.

In support of this contention appellee's counsel cite and rely on *Brennan v. Titusville*, 153 U. S. 289. It

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was said in that case, quoting from Chief Justice Fuller, in *Leisy v. Hardin*, 135 U. S. 100, that, “‘The power vested in congress “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,” is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419. ‘And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons, and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action.’”

But the facts in that case (*Brennan v. Titusville*) were entirely different from those in the case at bar, though at first blush they may seem to be very similar. In that case J. A. Shephard was a manufacturer of picture frames and maker of portraits, residing in Chicago, Illinois, of which State he was a citizen, and in which city he had his factory and place of business. He employed agents, who, under his direction, solicited orders for pictures and picture frames in the State of Pennsylvania, and other States of the union, by going personally to residents and citizens of said States and exhibiting samples, going, when necessary, from house to

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house. Brennan was an agent of Shephard, employed by him to travel and solicit orders for said articles in the manner stated, upon a salary, and also upon commission upon the amount of his sales.

Upon receiving orders for pictures and picture frames the agents of said Shephard forwarded the same to him at Chicago, Illinois, where the goods were made, and from there said Shephard shipped the goods to the purchasers in Titusville, Pennsylvania, by railroad freight and express, and the price of said goods was collected and forwarded by the express companies, and sometimes by the agents, to Shephard, at Chicago, Illinois. The agent, Brennan, employed by said Shephard, was engaged in conducting the business in the manner stated at the time of his arrest, in said city of Titusville, Pennsylvania. There was at the time in force in said city an ordinance enacted by said city of Titusville, providing "That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to said treasurer therefor the following sums, according to the time said license shall be granted," and then follows the price of the license for the different lengths of time for which they may be granted. The penalty provided for a violation of the ordinance was a fine not exceeding \$100.00, nor less than the amount required for a license to such person, together with 20 per cent. added with costs of suit. The agent had not procured a license when he did the business with which he was charged. It was further said in that case, quoting from the opinion of Mr. Justice Bradley in *Leloup v. Mobile*, 127 U. S. 640, 645, that: "'Of course the exaction of a license tax as a con-

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dition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.'” And further quoting in that case, from the opinion of Mr. Justice Field, in *Welton v. Missouri*, 91 U. S. 275, 278, it was said: “‘Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves.’”

It was further said in the case of *Brennan v. Titusville*, *supra*, that: “It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And, notwithstanding the fact, that the regulation of interstate commerce is committed by the constitution of the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it.” And after reviewing a long line of decisions of the Supreme Court of the United States, it was said by Mr. Justice Brewer, who delivered the opinion of the court, that: “Within the reasoning of these cases it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was, therefore, beyond the power of the State.” For that reason the judgment of the supreme court of Pennsylvania, which had held the ordinance valid, was reversed.

It follows, therefore, from these principles well established by the decisions of the Supreme Court of the United States, the court of last resort upon such questions and whose decisions thereon are binding upon and authoritative with us, that if the goods involved in the

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case now before us were the subjects of interstate commerce at the time the appellee was dealing with them, and if the appellee in selling them as he did was engaged in interstate commerce, then the ordinance he was charged with violating was void, at least as to him and that transaction.

But it will have been observed that the facts in *Brennan v. Titusville*, *supra*, as before remarked, are very different from those in the case now before us. The goods in Brennan's case, when his employment was at an end in each sale, were still in the manufacturer's possession in another State than that in which he made the sales. His employment as a "person canvassing or soliciting within said city orders for goods, etc.," was at an end so far as the restriction in the ordinance went when he transmitted the order for which he had canvassed or which he had solicited to his employer in the other State. Therefore, in taxing his occupation the goods were taxed by the ordinance before they had come into the State of Pennsylvania, and become incorporated into the mass of property in that State, and while they were in the State of Illinois. Not so under the facts in the case now before us.

Before appellee's employment can begin in any sale of chairs, as shown by the agreed state of facts, such chairs must be first shipped by their owners and manufacturers, A. H. Ordway & Co., in Massachusetts into the State of Indiana for sale by the appellee as their agent. The chairs in the regular course of business, as shown to have been conducted by the appellee, must reach their final destination and resting place in Indiana before appellee can have anything to do with them. After they reach such final destination, and not before, appellee's employment, which is taxed by the ordinance, begins.

Whether such chairs after their final destination is reached are the subjects of interstate commerce is the

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turning point in this case, and is a very different question from that presented in *Brennan v. Titusville, supra*. There the employment of the agent ceased before the goods were shipped even, and much longer before they reached their final destination and resting place as to each particular sale. But the Supreme Court of the United States, more than one year later, on March 4, 1895, decided a case that is exactly in point, namely, *Emert v. Missouri, supra*.

At page 309, Mr. Justice Gray, speaking for the court, said: "The facts were agreed, that the Singer Manufacturing Company, for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county, in the state of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account and that he offered this machine for sale to various persons at different places, and found a purchaser, and sold and delivered it to him.

"The supreme court of the State, in its opinion understood and assumed the effect of those facts to be as follows: 'The defendant was engaged in going from place to place, selling and trying to sell sewing machines, in Montgomery county, in this State, and had been so engaged for some years. He carried the machines with him in a wagon, and on making a sale delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold.

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These acts bring him clearly within the statutory definition of a peddler; and, having no license from the State, he became liable to the penalties imposed by the statute, unless, for any reason, he was exempt from the operations of the law.' * * * * Upon any construction, it is clear that the defendant was engaged in going from place to place within the State, without a license, soliciting orders for the sale of sewing machines, having with him in the wagon at least one of those machines, and offering that machine for sale to various persons at different places, and that he finally sold it, and delivered it to the purchaser. * * *

“The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri in a wagon, without a license. *There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time.* His dealings were neither accompanied nor followed by any transfer of goods * * from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears the only goods in which he was dealing had become a part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State. The statute in question is not part of the revenue law. It makes no discrimination between residents or products of Missouri and those of other States, and manifests no intention to interfere, in any way, with interstate commerce. Its object in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the

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county, appears to have been to protect the citizens of the State against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place, and from door to door." A large number of the decisions of that court upon that question are reviewed in the case last quoted from above, and quotations made therefrom. Quoting from *Brown v. Houston*, 114 U. S. 622, it is there said: "Coal brought in flat boats from Pittsburg to New Orleans was still afloat in the Mississippi river after its arrival, in the same boats, and in the same condition in which it had been brought, and was held in order to be sold on account of the original owners by the boatload. Yet this court unanimously decided that a tax imposed by general statutes of the State of Louisiana upon this coal was valid; and speaking by Mr. Justice Bradley, said: 'It was not a tax imposed upon the coal as a foreign product or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination, and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.' 'The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce inconsistent with that perfect freedom of trade which congress has seen fit should remain undisturbed. But if, after their arrival within the State—that being their place of destination for use or trade—if, after this, they are subjected to a general tax laid alike on all property

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within the city, we fail to see how such a tax can be deemed a regulation of commerce, which would have the objectionable effect referred to."

And it was there further said: "In *Robbins v. Shelby Taxing District*, 120 U. S. 489, indeed, the majority of the court held that a statute of Tennessee requiring 'all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample,' to pay a certain sum weekly or monthly for a license, was, as applied to persons soliciting orders for goods on behalf of houses doing business in other States, unconstitutional as inconsistent with the power of congress to regulate commerce among the several States. * * * The distinction on which that judgment proceeded is clearly brought out in the following passages of the opinion: 'As soon as the goods are in the State and become a part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown v. Houston*, 114 U. S. 622. When goods are sent from one State to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown v. Houston*, *qua supra*; *Machine Co. v. Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself. The negotiation of sales of goods which are in another State, for the purpose of introducing them into

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the State, in which the negotiation is made, is interstate commerce.”

And quoting from the opinion of Mr. Justice Field, in *Welton v. Missouri*, 91 U. S. 275, involving a State statute discriminating against goods from other States, it was further said, in *Emert v. Missouri*, *supra*, that: “The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.”

In the case now before us, the goods, as shown by the agreed state of facts, had been sent by the owners and manufacturers from one State into another, from Massachusetts to Indiana, for sale, reaching their final destination and resting place before they were sold or offered to be sold, and before appellee's employment in connection with them commenced. His employment was taxed by the ordinance, and that was, under the authorities cited, a tax upon the goods themselves, it is true, but before such employment begun, the goods had reached their final destination and place of rest and ceased to be subjects of interstate commerce, and had become incorporated in the general mass of property in this State and liable to be taxed as other property, there being no discrimination made in the ordinance against them as goods from another State, they not being taxed by reason of being brought from another State, but only taxed in the usual way, as other goods are. There was no attempt in the ordinance in question to tax the sale of goods, or the offer to sell them, before they are brought into the State. There was no negotiation of sales of goods which were in another State for the purpose of introducing them into this State.

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It will have been observed that in the case we have been quoting from, *Emert v. Missouri*, *supra*, the Supreme Court of the United States is careful to note that while the defendant Emert's occupation was offering for sale and selling sewing machines manufactured and owned in New Jersey, yet that there was nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time; and that his dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer from one State to another. Had it been otherwise, the case would have been ruled by *Brennan v. Titusville*, *supra*. There is no conflict between the two cases, as appellee's counsel seems to suppose. On the contrary, the opinion in the latter case expressly mentions the former as following the rule laid down in *Robbins v. Shelby Taxing District*, *supra*, and as in harmony with the rule laid down in the case then before the court, the conclusion there reached being that the Missouri statute, there involved, was in nowise repugnant to the power of congress to regulate commerce among the several States, but was a valid exercise of the power of the State over persons and business within its borders.

That conclusion is decisive of the question here involved and discussed by counsel on both sides. But appellee's counsel seeks to avoid the force of that conclusion by contending that the facts agreed upon do not bring the present case within that rule, because, as he contends, that: "The defendant was engaged in the sale of chairs on the installment plan. When a purchaser was found, only a conditional sale was made, the title being retained in the foreign owner until some indefinite time in the future. It might never vest in the purchaser, for the reason that he might never comply with the conditions of the sale."

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And the further contention is that an actual sale is necessary to bring the defendant within the rule laid down in *Emert v. Missouri, supra*, by the Supreme Court of the United States. It is a sufficient answer to that contention to say that while that case was one where an actual sale had been made, yet no rule was there laid down that an actual sale was necessary in that or any other case, though the prosecution was for a violation of a statute providing that "No person shall deal as a peddler without a license."

Whether that statute was actually violated or not by Emert was not discussed or decided by the Supreme Court of the United States because that was not a federal question and that court has no jurisdiction on a writ of error to the Supreme Court of a State as was the case there, to decide anything but federal questions. The ordinance here involved, however, was very different from the Missouri statute. The ordinance prohibited hawking and peddling without a license, and under the authorities already cited that forbade the selling and offering to sell. The Missouri statute would probably have been held, by the Supreme Court of that State, had the question been presented, to require actual dealing by a peddler to constitute a violation thereof.

But the learned counsel for the appellee himself speaks of the transactions of his client as shown in the agreed facts as a "sale" and the persons to whom such sales were made as a "purchaser." This is significant. It indicates that the learned counsel, though deeply interested in showing that such transactions were not sales, and that the persons with whom his client had them, were not purchasers, yet with all his learning he could find no word in the English language that would so aptly and tersely express what the acts of his client meant or amounted to, or would so correctly characterize them

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as the word "sale;" and no word that would so correctly characterize the persons with whom his client had the transactions, as the word "purchaser."

The circumstance that the sales were on the installment plan, the title being retained in the foreign owner until the terms and conditions of the sale were complied with did not wholly eliminate from the transaction all characteristics of a contract of sale. In an executed contract of sale the thing which is the subject of the contract becomes the property of the buyer the moment, the contract is concluded and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller; whereas in an executory contract of sale the goods remain the property of the seller till the contract is executed. 21 Am. and Eng. Encyc. of Law, 476, and numerous authorities there cited in note 1, among which are: *Straus v. Ross*, 25 Ind. 300; *Lester v. East*, 49 Ind. 588.

Most of the sales made by commercial travelers or drummers are mere conditional sales, yet no one thinks of denying that they are sales, the title to the property remaining in the seller until the conditions of the sale are fully complied with. And yet those transactions are correctly denominated sales. Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest in the purchaser until the terms of the sale are complied with. *Lanman v. McGregor*, 94 Ind. 301; *Evansville, etc., R. R. Co. v. Erwin*, 84 Ind. 457. And yet no one in his senses would think of denying that such a transaction was a sale. If such contention were to prevail, all sales by hawkers and peddlers might escape all restraint by cities by inserting such a provision in the contract.

It is lastly contended that the agreed facts do not show that appellee was guilty of a violation of the

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ordinance because there is no statement therein : "That while so engaged the defendant sold and delivered to one Emma Wright, one rattan rocking chair for the sum of six dollars," as was charged in the complaint. It is true that statement was in the complaint and is not found in the agreed facts and if that were the only charge in the complaint the trial court would have been justified in finding for the defendant.

In addition to the above charge the complaint charges "that the defendant on the 12th day of September, 1894, at the city and county aforesaid, violated sections 24 and 25 of the ordinance (describing it) by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend, by carrying, exposing, offering and crying for sale articles of merchandise, to-wit: Rattan rocking chairs in the public streets of said city without having a license for that purpose."

Among other things the agreed facts are that : "The defendant * * at the time of his arrest and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city and selling the chairs and delivering the same at the time of sale," etc. He could not be selling chairs without making actual sales, and if he did it by going personally from house to house in said city selling the chairs and delivering the same as he has agreed that he did, then he violated the ordinance in both hawking and peddling.

The necessary conclusion upon authority as well as upon principle is that the ordinance in question is in nowise repugnant to the power of congress to regulate commerce among the several States, but is a valid exercise of the police power of the State, vested by the State statute in the city over persons and business within its borders.

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It follows that the finding and decision of the circuit court were contrary to law and the evidence, and that it erred in overruling the motion for a new trial.

The judgment is reversed and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

HOWARD, C. J., took no part in this decision.

Judgment reversed.

Filed September 17, 1895.

NOTE.—The regulation of peddling, as affecting interstate commerce, is considered in a note to *Re Spain* (U. S. C. Ct.), 14 L. R. A. 97.

No. 17,075.

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WILL. — *Action to Set Aside. — Parties.* — A legatee, under a will sought to be set aside, need not be made a party defendant in an action by the legatees and devisees under another will which has been lost, in which he was also a legatee, where he elects to join as plaintiff.

SAME. — *Action to Set Aside. — Sufficiency of Complaint. — Motion to Make More Specific.* — A motion to make more specific a complaint in an action under R. S. 1894, section 2766, to set aside a will for fraud, undue influence, mental incompetency, and because it is a forgery, is properly refused, where the statement of the grounds of contest is in the language of the statute.

SAME. — *Action to Set Aside. — Several Statutory Grounds United in One Paragraph. — Repugnancy.* — A complaint in an action to set aside a will on the ground of mental unsoundness of the testator, and undue influence, that it was executed under duress and obtained by fraud, and that it was a forgery, may be framed in one paragraph, under R. S. 1894, section 2766, providing for the contest of a will for such reasons, without requiring the grounds to be separately paragraphed.

SAME. — *Who May Be Contestants.* — Devisees or legatees under a lost will may contest the validity of another will attempting to dispose

142	55
144	192
144	637
146	370
146	623

142	55
154	37
142	55
157	51

142	55
160	472
149	55
161	70

142	55
170	213
170	508

142	55
171	95

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of the same estate, under R. S. 1894, section 2766, authorizing persons "interested in the estate" to contest the will.

SAME. — *Evidence. — Testimony of Contestant.* — A party to a will contest cannot, under R. S. 1894, section 507, testify respecting things which were not open to the observation of all the friends and acquaintances of the testator.

APPELLATE PROCEDURE. — *Evidence. — Cross-Examination. — Discretion.* — The discretion of the trial court in limiting the extent of a cross-examination will not be interfered with on appeal, in the absence of an abuse thereof.

EVIDENCE. — *Admission of. — Estoppel.* — A party cannot complain of the admission of evidence, the substance of which he has elicited by another question.

SAME. — *Statement to the Court of Alleged Privileged Communications. — Practice.* — A statement to the court in the absence of the jury, of alleged privileged communications, is not prejudicial error.

SAME. — *Will. — Contest. — Forgery.* — Contestants of a will, on the ground that it is a forgery, need not specifically show the identical person whose hand perpetrated the forgery.

SAME. — *Expert Witness. — Signature.* — An expert witness may give his opinion as to the genuineness of a signature, based upon facts to which he has testified.

SAME. — *Confidential Communications. — Attorney and Client. — Will.* — Explanatory statements by a widow to an attorney, of the reasons for her husband changing his will, made after he had disposed of certain matters, in which she had sought his professional advice, are not within R. S. 1894, section 505, excluding "confidential communications made to attorneys in the course of their professional business."

SAME. — *Lost Will. — Declarations of Testator.* — Declarations of a testator, shortly before his death, as to his manner of disposing of his property, are admissible to show the contents of an alleged lost will, and whether it remained unrevoked at his death, where the existence of such lost will must be proved to establish the right of the contestants of another will to maintain their action.

COURTS. — *Continuance of Sitting After Term Time. — Trial.* — A continuance of the sitting of court in an action beyond the term at which it was commenced, is authorized by R. S. 1894, section 1442, where it is impossible to complete it before the expiration of the term.

WITNESS. — *Non-Expert. — Disputed Signature of Attesting Witness. — Refreshing Memory.* — A non-expert witness who has testified in regard to the disputed signature of an attesting witness to a will, cannot be cross-examined in regard to the signature of such witness

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upon a cash book, which he has in his possession, on the ground that he may look at such pages to refresh his memory.

SAME. — *Will.* — *Signature.* — *Manner in which Testator Signed his Name.* — A witness who has testified, from his knowledge of having seen the testator write, that his signature to a will was not genuine, cannot be asked on cross-examination, after having been shown purported signatures of the testator to several checks, whether, from his "present knowledge," the testator wrote his name in a designated manner.

INSTRUCTION TO JURY. — *Refusing.* — *Given in Substance.* — An instruction, accurately stating the law, is properly refused where another instruction substantially similar has been given.

From the Hamilton Circuit Court.

Fishback & Kappes, A. C. Harris, L. A. Cox, G. Shirts and *A. J. Beveridge*, for appellants.

J. M. Cropsey and *Miller, Winter & Elam*, for appellees.

JORDAN, J.—This action was commenced by the appellees, Malcolm A., Malcolm S., Joseph E. and Jessie C. McDonald, against the appellants, Josephine F. McDonald and Theodore P. Haughey, executors, etc., to set aside what was alleged to be a pretended will of the late Senator Joseph E. McDonald. A trial resulted in the jury finding in favor of the contestants, and over appellants' motion for a new trial the court rendered a judgment setting aside the will in contest. To reverse this judgment appellants prosecute this appeal. Numerous alleged errors of the trial court are assigned, and many questions thereunder are presented by appellants' learned, able, and eminent counsel. Some of these questions are now to be considered for the first time by this court, and the examination of the many authorities cited, *pro* and *con*, in the very ably and elaborately prepared briefs of counsel, has required much labor and time. In our examination of the voluminous

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record, we have been subjected to more labor and required to consume more time than would otherwise have been necessary had appellants complied with rule 31 of this court in regard to placing marginal notes upon the transcript. An observance of this rule is essential upon the part of litigants in order to assist the judges and facilitate the business of this court, which is now virtually overwhelmed with cases and labor. A noncompliance with this rule generally results in the court setting aside the submission of the cause at the costs of the appellants. The penalty may be a dismissal of the appeal when deemed proper by the court.

The amended complaint in the case at bar alleges the death of Joseph E. McDonald on June 21st, 1891, and that he left surviving him Malcolm A., as his only living son, and that Joseph E. and Jessie C. are his grandchildren, being the children of one Ezekiel McDonald, deceased, and Josephine F. is alleged to be the surviving widow of the testator, Joseph E. She, as it appears, being his childless second wife. It is then alleged substantially as follows :

That in the year of 1891 a certain paper in writing, purporting to be the last will of Joseph E. McDonald, and purporting to have been signed by him, and attested by Alpheus Snow and Parke Daniels, of date August 20, 1890, was admitted to probate in the Marion Circuit Court, filed and recorded therein, and that letters testamentary were issued to appellant Haughey, who was named in said will as the executor thereof ; that in said pretended will certain described real estate in Marion county, Indiana, known as "the Washington street" property, of which said Joseph E. died the owner, was purported to be devised to Josephine F. McDonald, who accepted the provisions of the will, and that she asserts and maintains that the same is the

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true and only last will of her husband, Joseph E. The complaint then charges that said pretended will is invalid, and is not the last will of said McDonald, for the following reasons :

“Said pretended will was unduly executed.

“Said pretended will was obtained by the undue influence of said Josephine F. McDonald, the defendant herein.

“Said pretended will was procured by fraud.

“Said pretended will was not executed by said Joseph E. McDonald, and the pretended signature of said Joseph E. thereto was not made by him or by any one in his presence, with his consent.

“Said pretended will was not attested and subscribed in the presence of said Joseph E. McDonald, by said Alpheus H. Snow and Parke Daniels, or either of them, as witnesses thereto, and the pretended signatures of said Snow and Daniels thereto, as the attesting witnesses thereof, were not subscribed by them, or either of them, or by any one for them at their procurement, or with their knowledge or consent, and are not the act and deed of them, or either of them.

“That said pretended will was unduly executed, and was not executed by the said Joseph E. McDonald, deceased, for that, at or about the time said pretended will bears date, said Joseph E. McDonald executed in writing his true and genuine last will and testament, which was attested and subscribed in his presence by two competent witnesses, and which was, and is, in substance and to the effect as follows :

“(a) A direction for the payment of his debts.

“(b) A devise unto Josephine F. McDonald for her life of the real estate hereinbefore described.

“(c) And to said Josephine F. McDonald all his per-

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sonal property at his homestead at the time of his decease.

“(d) To the plaintiffs, Malcolm A. McDonald, Joseph E. McDonald and Jessie C. McDonald, heirs at law of the said Joseph E. McDonald, the fee simple of the real estate above described, together with all other real and personal property of the said Joseph E. McDonald which he might have at his death, not specifically bequeathed to the said Josephine F. McDonald.

“(e) To the plaintiff, Malcolm S. McDonald, the gold watch which the said Joseph E. McDonald might have at the time of his decease, and also the law library of the said Joseph E. McDonald, if the said Malcolm should choose the profession of the law.

“And that said will and testament remained and was at the death of said Joseph E. McDonald, his true and only last will and testament.

“And thereafter, without the knowledge or consent of the said Joseph E. McDonald, or of the plaintiffs, or either of them, the said true and genuine last will and testament was removed, lost, or stolen by, or at the procurement of such person or persons concealed, suppressed, or destroyed, without the knowledge or consent of the said Joseph E. McDonald, or of the plaintiffs, or either of them, and the pretended will of the said Joseph E. McDonald as it has been admitted to probate in said court, was thereupon, by or at the procurement of such unknown person or persons, substituted or foisted in the room and place of the true and genuine last will and testament of the said Joseph E. McDonald.

“All of which was done without the knowledge or consent of the said Joseph E. McDonald, or of the plaintiffs, or either of them.

“And neither the said Joseph E. McDonald, nor either or any of the plaintiffs, at any time thereafter, during

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the lifetime of said Joseph E., had any knowledge, or consented to such removal in any way, or concealment, suppression, or destruction of the said true and genuine last will and testament of the said Joseph E. McDonald, or of the substitution therefor, of said pretended will, as it has been admitted to probate.

“And the plaintiffs aver that they have made diligent search and inquiry to discover the said true and genuine last will and testament, so concealed, suppressed, or destroyed, but have hitherto been unable to discover the same, or to obtain any information, where, or in whose possession, control or custody the same is, and they do not know any person or persons, whom they, or either of them, can suppose to have possession, power, or control of said true and genuine last will and testament of the said Joseph E. McDonald, or against whom they, or either of them, can justifiably invoke any process of this court looking to the possible production of such true last will and testament to this court.

“Wherefore the plaintiffs pray the court that said pretended will be declared void, and that the probate thereof be set aside.”

We will consider the various points and contentions of appellants in the order in which the same have been presented in their brief. It is contended that the court erred in not sustaining the motion of the appellant, Mrs. McDonald, to compel the plaintiffs to elect whether they would prosecute their action upon the theory that the will in contest was a forgery, or upon the theory that the execution thereof, by the testator, was obtained by undue influence, and also in overruling a motion to make the complaint more specific.

It is a well-settled legal proposition that a cause must be put to trial upon a definite theory, and that such theory must be outlined by the pleadings and sustained

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by the law applicable to the case. The contention of counsel for appellants is that the appellees in their complaint assume inconsistent positions. After setting forth the grounds of contests as mentioned in the complaint, they say "it must be apparent that if the will was procured by undue influence, it could not have been a forgery, and *vice versa* if a forgery it could not have been procured by undue influence."

Numerous authorities on the code practice in other States are cited to show that inconsistencies are not permitted in a single pleading or paragraph, and counsel then propound the question, "Does a complaint under the will statute have any exception in this respect to the general rule?" Section 2596, R. S. 1881 (section 2766, R. S. 1894), of an act concerning wills is as follows :

"Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court of the county where the testator died, or where any part of his estate is, his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto."

It is true that under the civil code different causes of action must be stated in separate paragraphs. But an action to contest the validity of a will is a special statutory proceeding.

Under the section above quoted, the contesting party is required to file in the circuit court his *allegation in writing*, verified by his affidavit, setting forth the par-

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ticular grounds of contest as mentioned in the statute, *or any other valid objection to its validity*. This section, we think, evidently authorizes the “*allegation in writing*” to consist of a complaint in one paragraph, if the pleader so desires, in which the will may be assailed upon any and all grounds that will expose its invalidity. The contest of a will, being a special proceeding under the statute, we must look to section 2596, *supra*, in order to ascertain the character of the complaint required, and not to the provisions of the general code. *Summers v. Copeland*, 125 Ind. 466. We recognize nothing in this section of the law which either expressly, or by implication, prohibits inconsistency, repugnancy or duplicity, or which requires that the several grounds of contest shall be stated in separate paragraphs. The cause of action contemplated by the section is the resisting of the probate, or setting aside the will for certain specified reasons, and, in addition to these, for “*any other valid objections*.” The complainant may charge, or allege, any one or more valid objections to the will as the grounds of his action, without regard to consistency or repugnancy, and upon the trial he may introduce evidence to sustain any one or more of the alleged grounds, and the court is not authorized to compel him to elect as to which he will seek to sustain.

It has been the practice in this State for years, in these actions, to join in a complaint, in one paragraph (if the plaintiff so desires), different grounds of contest, and, we think, it must be considered as settled that the plaintiff in such joinder is not confined to those grounds only which are consistent and not repugnant. *Kenworthy v. Williams*, 5 Ind. 375; *Etter v. Armstrong*, 46 Ind. 197; *Bowman v. Phillips*, 47 Ind. 341.

While it is true that in actions under our code a party who states his cause of action or defense in different

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forms must generally paragraph each cause, but he is not prohibited from joining in his complaint, in separate paragraphs, inconsistent causes of action or defense. *Snyder v. Snyder*, 25 Ind. 399, and cases cited. The provision of the statute which requires that a complaint to contest a will shall be verified does not necessarily imply that the grounds of contest shall be consistent.

An answer of *non est factum* under the code is required to be verified. Yet it is a common and unquestioned practice to join with such answer paragraphs confessing the execution of the instrument in suit, but seeking to avoid the action by alleging payment, or no consideration, etc. We are of the opinion that the ruling of the trial court in denying the application of appellant to require appellees to elect whether the case should be tried upon the theory of undue influence or forgery, made before and during the trial, was correct.

There was no error in overruling the motion to make the complaint more specific, for the reason that the statement of the grounds of contest in the language of the statute is sufficient. *Reed v. Watson*, 27 Ind. 443; *Bowman v. Phillips*, *supra*.

There was no error in the action of the court in overruling the demurrer to the complaint upon the grounds of insufficiency of facts and defect of parties. All of the contesting parties appear from the statements in the complaint to be devisees named in the alleged genuine will of the deceased testator, which will, as it is averred in the pleading, had been removed, lost or stolen, and the alleged spurious one in suit substituted in its place and stead. All of the complaining parties, except Malcolm S. McDonald, also appear to be the heirs at law of Joseph E. McDonald, deceased. The contention of appellants, in substance and effect, is that the theory of the complaint is twofold: That the appellees, both by

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their complaint and by the actions and statements of their counsel during the trial, sought to assail the invalidity of the will which had been admitted to probate; and also to establish the one said to have been lost or destroyed. The learned counsel for appellees insist and claim that the theory of the complaint is, and the only relief sought to be obtained thereby, was a decree of the court setting aside and annulling the will in contest; that the appellees sued, not as heirs, but as devisees or legatees of the destroyed will, under which they asserted their interest in the estate of the testator, and their legal right to contest the one said to have been forged; that in order to support the character in which they sued, it was necessary to refer to the one lost, or destroyed, and show that there was a true and genuine last will, by the provisions of which they were all interested in the estate.

But appellants further contend that if the amended complaint is construed only as going to set aside the probated will, then it must follow that there is a defect of parties for the reason that Malcolm S., being a legatee under the probated will, should have been made a party defendant, as required by the section of the statute herein cited. While it may be admitted that the complaint is not a model pleading in all respects, nevertheless we are of the opinion that, as outlined by the facts therein averred and stated, its evident purpose or theory is, and the only relief sought was, the setting aside of the probated will. It was a part of appellees' case, and one of the grounds upon which the contest was waged, and the one, as it appears from the special findings upon which the jury based their general verdict, that no such will as the one assailed ever existed as a genuine will. It is also apparent, we think, that appellees did not seek to maintain the action as the heirs

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of Joseph E. McDonald, deceased. It is not shown in the complaint that Malcolm S. is an heir of the deceased, but it shows that he, as well as all of the other co-complainants, are devisees and beneficiaries under the lost, but true and only will, in the place of which the spurious one, as averred, had been substituted. Under section 2596, *supra*, the contestants of a will must be persons interested in the estate. *Niederhaus v. Heldt*, 27 Ind. 480; *Schmidt v. Bomersbach*, 64 Ind. 53; *Kinnaman v. Kinnaman*, 71 Ind. 417.

In the case of *Schmidt v. Bomersbach*, *supra*, on page 55 of the opinion, this court said:

“The complaint must show the plaintiff to have an interest of some kind in the subject-matter involved in the contest.”

We think it is an evident legal proposition, under the section referred to, that any or all persons who are devisees or legatees under the lost and only will of a deceased testator have such an interest as will authorize them to contest the validity of another will, upon proper grounds, whereby the same estate is in whole or in part affected by the one under which the claim is sought or attempted to be distributed. Malcolm S., being interested as a devisee or legatee in the supposed lost but genuine will, together with his co-plaintiffs, had a legal right, together with them, to join in the action, and, having properly elected to join as plaintiff, it was not necessary to make him a defendant. It follows, therefore, that there was no defect of parties, and there was no error in overruling the demurrer on that ground. The fact that the will under which the appellees asserted their right to contest the one alleged to be invalid, was lost or destroyed without their knowledge or consent, and without the act, agency or authority of the testator, did not destroy their rights thereunder.

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It is not necessary for us in this case to decide as to the right of plaintiffs to have joined in their complaint a cause of action to establish and have admitted to probate the lost will, upon which they relied, or to consider the conflict, if any, existing between the decisions of *Summers v. Copeland*, *supra*, and *Roberts v. Abbott*, 127 Ind. 83.

The appellees, having based their right to maintain this action for the reason that they were interested in the estate by reason of the provisions of the lost or destroyed will, were, among other things in order to prevail upon the trial, required to establish that right.

Counsel for appellees insist that the questions presented by appellants under their assignment of error, that the court erred in overruling their motion for a new trial are not in the record, and therefore cannot be considered. It appears from the record that the trial of the cause was begun during the November term, 1892, of the Hamilton Circuit Court, and was continued from day to day until Saturday, February 4, 1893, which was the last day of that term. The trial still being in progress on that day, and it not being possible to complete it before the expiration of the term, upon appellees' motion, adjourned the further hearing of the cause until Monday, February 6, 1893, and from day to day until completed. February 6 was the day fixed by statute for the commencement of the next term of the Hamilton Circuit Court. The verdict of the jury was returned on the 17th day of that month, and the motion for a new trial was filed on the 13th of March next following. Under the circumstances a continuance of the sitting of the court in the cause beyond the November term was fully authorized by section 284, Ell. Supp., section 1442, R. S. (Burns) 1894.

On the trial of this cause appellees introduced one

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Jesse Caldwell, as a witness, who testified, from his knowledge of having seen Senator McDonald write, that his signature to the will in question was not genuine. Two points are raised by appellants relative to this witness:

First—That the witness was not permitted by the court to answer the following questions propounded to him upon cross-examination:

“Quest. Now, from your *present knowledge* of the signatures of Senator McDonald, tell the jury * * * whether in your judgment Senator McDonald always wrote the letters ‘on’ and then lifted the pen before making these (the) letters ‘al,’ and then lifted the pen and then made the final letter ‘d?’”

Second—That he was not permitted to answer the following put to him upon cross-examination:

“Quest. Look at this letter (referring to application for a marriage license), which you mentioned in cross-examination, and tell us whether if in making his name he did not make the ‘e’ one way and in the signature make it different?”

The first question seems to have been propounded by appellants’ counsel to show that the witness was mistaken in a statement drawn out of him upon cross-examination, to the effect that it was a peculiarity of the testator’s signatures, as they had come under his observation, that the word “McDonald” was not connected all the way through.

It does not appear that the witness had testified to this effect in chief. Preceding this first question, counsel for appellants exhibited to this witness, upon the stand, some fifteen checks, and a promissory note, purporting to have been signed by the testator, and over the objections and exceptions of the appellees the witness was asked if the signatures to the checks and note

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were genuine, and he answered that he thought they were. Following this answer the witness was asked the question first excluded. We think, it is apparent from the fact that these checks were exhibited to the witness, and also, from the form of the interrogation, the words "*now from your present knowledge*" being used, that the answer to the question involved the taking into consideration by the witness the checks and note exhibited to him upon the stand. That it was intended that the signatures to these checks should be considered by the witness in his response, more fully appears from a further question immediately asked him by counsel to the same effect. Whereupon he asked if he was to leave the checks out of the controversy, to which inquiry counsel for appellants made no direct response, but said: "*Speaking from your personal knowledge from what you know now.*" This witness was not an expert in handwriting, and it does not appear that he had seen the testator sign the checks and note. These were not papers in the case introduced for any other purpose, nor were the signatures thereto admitted by appellees to be genuine. The rule is firmly settled in this State that on a question involving handwriting, the only papers that may be used in examinations, of even an expert witness, are those which may have been brought into the case for another purpose. Other papers not pertinent to the case cannot be shown to the witness and used upon examination, unless the genuineness of the same is admitted by the party against whom the evidence is sought to be elicited. This rule is supported by the following authorities: *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472; *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Jones v. State*, 60 Ind. 241; *Forgey v. First Nat'l Bank*, 66 Ind. 123; *Hazzard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 80

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Ind. 500; *Shorb v. Kinzie*, 100 Ind. 429; *Walker, Admr., v. Steele*, 121 Ind. 436; *White Sewing Machine Co. v. Gordon*, 124 Ind. 495; *Doe Ex. Dem. Perry v. Newton*, 5 Ad. & El. 514 (31 Eng. Com. L. 712); *Van Wick v. McIntosh*, 14 N. Y. 439; *Bank, etc., v. Mudgett*, 44 N. Y. 514; *Miles v. Loomis*, 75 N. Y. 288; *Hynes v. McDermott*, 82 N. Y. 41; *Pierce v. Northey*, 14 Wis. 10.

The rule seems to be a reasonable one, and the ground or reason upon which it is founded is that its requirements are necessary in order to avoid the evil of having collateral issues injected into the case, and the minds of the jurors distracted thereby. If the papers or documents are not in evidence, or connected with the cause for some other purpose, and their genuineness is not admitted by the adverse party, then independent proof would be necessary upon the side of the party seeking to use them as a standard of comparison, to establish their authenticity. This evidence, the opposite party would be entitled to rebut, and thereby the parties would become involved in a collateral issue. This, the rule seeks to avoid. But counsel for appellants contend that there was no attempt upon their part to infringe upon this rule. It is said that there was no attempt to lay these papers before the jury. The force and effect of their contentions seem to be that they had the right to exhibit the checks to the witness, in order to test the accuracy of his statement as to how Senator McDonald wrote his name. Or in other words, that these papers having been shown to the witness, he ought to have been permitted to state what his present opinion was, after having seen them, as to whether "onald" in the testator's name was never written without a break. This rule must have the same application, and for the same reason, when a paper is shown to a witness for the purpose of

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testing his accuracy. If a disputed paper could be used for the purpose of testing the correctness of the opinion of the witness, a collateral inquiry would necessarily arise. *Bacon v. Williams*, 13 Gray 525.

The witness, from the fact that he had seen Mr. McDonald write his name seemed to have had an impression in his mind therefrom, as to the characteristics of his signatures. Then upon cross-examination it is drawn out by appellants that as the witness remembered, there would be breaks in the word McDonald, and the checks and note were then shown him and the question asked. We think it must be apparent that the purpose of this inquiry was to have the witness to compare the exemplary in his mind, formed by his acquaintance with the signature of the testator, with the new exemplary obtained or formed by the inspection of the checks and note. If this could be held admissible, then it must be evident that the rule referred to forbidding papers not admitted to be genuine to be used as a standard of comparison would be abrogated, and the evil which it was intended to prevent would necessarily follow. For if the witness had stated that the signatures to the checks and note were not genuine, then if appellants were entitled to use them for the purpose as insisted, surely they would have been entitled to contradict him by other evidence. And likewise if he stated they were true signatures, to the appellees must be conceded the right to show the contrary, and hence at once the collateral inquiry would have arisen. There was no error in excluding this question. If there was any error it was in permitting, over the objection of appellees, the witness to state that signatures to the checks and note were genuine. This witness testified in chief, that at one time he saw the testator subscribe his name to a certain request for a marriage license to be issued, which paper,

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he incidentally stated, he had in his possession. No evidence based upon this written request appears from the record to have been brought out by appellees. The second question seems to have been founded upon the alleged right of appellants to cross-examine the witness as to the difference of the letter "E.," in this request, and the one in the signature to the will. We do not think that the appellants are in a position to be heard on their complaint, on this question, for the reason that the record shows that this second question was answered by the witness as follows: "I don't know, it is different. I cannot answer that," and this answer seems to have been permitted to remain in evidence.

Appellants seem to have had the benefit of all the knowledge that the witness possessed on that particular point, and for this reason alone, if for no other, we cannot adjudge that the court erred in not permitting counsel to further interrogate him relative to the capital "E." in the paper in question.

It is a settled rule of practice that the extent to which a cross-examination may be conducted is largely within the discretion of the trial court, and such discretion will not be interfered with by this court, unless it clearly appears, by the record, that it has been abused to the injury of the complaining party. *White Sewing Mach. Co. v. Gordon, supra.* Maurice Butler, not an expert witness, testified in behalf of appellees relative to the disputed signature of the attesting witness, Parke Daniels. On cross-examination he was shown some pages said to be from a cash book of McDonald and Butler, upon which the signature of Daniels appeared. These pages had not been referred to by the witness in his examination in chief. He was then asked to state whether the capital "D," as it appeared in these pages, was not above the line, almost as the "D" in the signature to

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the will. This question was excluded. These pages of the cash book were not properly papers in the case for any purpose. The authenticity of Daniels' signature therein was not admitted, and the use of them was prohibited by the rule heretofore considered. Counsel for appellant argue that as these pages of the book were in the possession of the witness, he had the right to look at them for the purpose of refreshing his memory, under the rule laid down in *Thomas v. State*, 103 Ind. 419, and *White Sewing Mach. Co. v. Gordon*, *supra*.

But we fail to see the application of this rule to the question raised, and it is not made apparent by the record nor by appellants' brief. Some criticism is urged by appellants to the ruling relative to the witness, Henry L. Tolman, but as no evidence appears from the record to have been given by this witness under such ruling, the error, if any, must be deemed to have been harmless. There was no error in the action of the court in not permitting the witness Hurty, who seems to have examined a large number of checks signed by the testator, to state in how many of them the word "onald" was connected, and in how many divided, for the reason that appellants substantially elicited the same evidence or explanation from the witness by another question, but in a different form.

Appellants next complain and insist that the court erred in hearing apart from, and out of the presence of, the jury certain communications made to John M. Butler, an attorney at law, by the appellant, Mrs. McDonald, which, she claimed, were privileged, upon the grounds that they were confidential, being made by her to him as her attorney. Butler, who was introduced as a witness by appellees to testify to these communications of Mrs. McDonald, disclaimed that the relation of attorney and client existed between him and said appel-

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lant. This, however, was a matter proper for the court to determine, we think, from the facts, after hearing them, beyond the jury. *Bacon v. Frisbie*, 80 N. Y. 394. However, if we are not correct in this statement of practice, still, if the action of the trial court was erroneous in this respect, it is not available to appellants, for the reason that it does not appear that any privileged communications made by Mrs. McDonald and detailed by Butler to the court, were given in evidence to the jury. If what he detailed to the court was not heard by the jury, we fail to see how appellant was prejudiced thereby in the trial of this cause. Certain statements made by Mrs. McDonald shortly after the death of her husband, at her home in Indianapolis, to the witness, John M. Butler, were by the court permitted to be given in evidence by him, in behalf of appellees, and this ruling of the trial court, in admitting the same, is assailed by appellants, for the alleged reason that these statements were privileged, under the rule that forbids the disclosure of communications made by a client to his or her attorney, in the course of their professional relations. Section 497, R. S. 1881, and section 505, R. S. 1894, excludes "confidential communications made to attorneys in the course of their professional business, and as to advice given in such cases." This witness, as we heretofore said, disclaimed that at the time the communications were made he was acting in the capacity of an attorney for appellant, and stated that he was not consulted professionally by her, but that he was advising her only as a friend. As hereinbefore said, this relation must be determined by the court from all the facts appearing, and not alone from the disavowal of the attorney.

It appears that the witness, Mr. Butler, was an eminent lawyer, and engaged at the time in active practice

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of his profession. The deceased, Senator McDonald, had been his partner in the practice of the law, for many years, up to the date of his death. On June 29, 1891, a few days after the death of the testator, Mrs. McDonald wrote and sent to Mr. Butler at his law office in Indianapolis, the following note :

“MR. JOHN M. BUTLER.

DEAR SIR:—Mr. SNOW kindly suggested your calling should I wish to consult with you. There are many things in which I need your good advice, and would be pleased to see you Wednesday evening after business hours if convenient. Yours truly,

MRS. JOSEPH E. McDONALD.”

In response to this request, Butler called at the home of Mrs. McDonald. After he was seated, the conversation appears to have been commenced by her saying to him : “Mr. McDonald has always told me that if in any emergency or condition I desired the advice of a friend on whom I could rely absolutely, to send for you.” Butler stated that there was nothing said by her about desiring to consult him professionally, or with reference to any legal questions. That she was merely asking advice of him as a friend. “Nothing,” said the witness, “as to her rights was talked about.” The first item of the conversation at the house after telling Butler that her husband had recommended her to confer with him as a friend, was in regard to some awnings at the windows that had been put up by a young man, with whom she had contracted during the life of her husband. These awnings had not all been placed during the life of her husband, for the reason that the noise annoyed him while in his sick condition. After his death it appears she wanted the awnings that were up taken down; this the party declined to do. It was

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finally agreed that he should complete the placing of the awnings at the exact cost for so doing, and that after doing the work he had presented to her a bill for his services, which she thought was too large. That when she informed this man that his bill was not correct, he got angry and made some saucy remarks in response. After detailing this, she then said to Butler "What am I to do." To this he replied, "do nothing. Mr. Beveridge is Mr. Haughey's (the executor) attorney and when these people present any bill all you want to do is to turn them over to Beveridge and Haughey." That ended the conversation in regard to the awnings. The next matter to which the conversation turned was relative to Mrs. McDonald's income. She spoke about having been making some figures about her income, and how much it would be. Butler also made some estimation relative thereto, and she inquired of him if he deemed it sufficient to afford her a living if she continued to live at the house where she then resided, and Butler told her that it would. Some other matters relating to debts, and money which the witness had sent her arising out of the settlement he had made of the partnership affairs of the law firm of McDonald and Butler were talked about. After the conversation about the income and settlement had ended, it appears to have been turned by Mrs. McDonald to another subject. This conversation was detailed by the witness as follows, and was permitted over the objections of appellants to go to the jury as evidence in the case in behalf of the appellees.

Turning her head to me, said the witness, Mrs. McDonald said :

"Now, Mr. Butler, you cannot blame me about the will." I said, "Mrs. McDonald, I am not blaming anybody about the will." "Well," she said, "you ex-

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pressed astonishment at the will when it was read by you down at the office, now," she says, "you cannot blame me about it ; I have done nothing more than any wife has a right to do ; I have gotten all from my husband I could for my support." I said again "I am not blaming anybody about the will, but there is just one thing that worries me." She says, "What is it?" I said, "in all our long continued friendship and years of close intimacy Mr. McDonald never made a statement to me of a fact in his life that did not turn out just exactly as he said it would except this one, now," I said, "how do you account for it that he told me his will was one thing and it turns out to be another thing?" She said, "I can explain that;" she said, "he did have such a will as he told you about, but I did not like it and I got him to change it." Well, I did not say anything much to that, but after thinking a moment I said, "It would have been substantially the same so far as the income to you is concerned if it had been as he told me, because you would have had the whole income from it all your life, the only difference would have been you could not will it away or sell the Washington street property." Then she says, "It was putting a price on my head and I did not like it, and I got him to change it, and I expect that in his weak state of mind and body his mind reverted to the will he had formerly made and for the time being forgot the will as it now is." I did not say anything more than that; I think that pretty much ended the conversation; I think the next thing that was talked about she was asking me when I would go away on my vacation, etc.

Counsel for appellants strenuously insist that there was error in allowing these statements as to the will to be detailed as evidence by Butler to the jury, under the rule laid down by section 497, *supra*, as construed by

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judicial decisions. Many authorities are cited upon this proposition, but we do not consider it necessary to extend this opinion in a review of these. We fully recognize the importance and the necessity for the strict enforcement of this salutary rule which forbids an attorney at law to disclose communications confided to him in the course of his professional business, or as to advice given in such a case. We also recognize that it is well settled by the decisions of this court, and many others, that this rule is not to be extended to such communications which come to the knowledge of an attorney when the relation of counsel and client does not exist. To come under the protection of the rule, in question, the communications claimed to be privileged must be addressed to an attorney in his professional character of a legal adviser, with a view to legal advice which as an attorney it was his duty to give. *Borum v. Fouts*, 15 Ind. 50; *Hanlon v. Doherty*, 109 Ind. 37; 1 Greenl. Ev., section 244.

It does not clearly appear that any part of the conversation between Butler and the appellant, at her house, came within this rule. However, passing this question without deciding, we are of the opinion that the statements of Mrs. McDonald testified to by the witness in regard to the will were not privileged and were properly admitted. These were independent of, and had no connection whatever with, nor reference to, what had been previously said or talked about by the parties. That conversation seems to have ended before she introduced the other in reference to the will. It is obvious, we think, that they were not made to him as an attorney in the course of his professional business, neither did they have any reference to, or connection with, advice given or sought from Butler as an attorney. After having disposed of all matters in which she probably might have sought his professional advice, she seeks to

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explain to him how it was that her husband had changed his will, and executed one whose provisions were somewhat different from those stated by the testator to Butler. The latter as an acquaintance and friend of the husband had expressed surprise that the will of the latter found after his death did not correspond with the one that the deceased had referred to shortly before his death, and these explanatory statements seem to have been made to satisfy Butler on this question, and for no other apparent purpose. The rule laid down in the case of *Maas v. Bloch*, 7 Ind. 202, cannot be extended to the question herein involved. The facts in that case and the one at bar are different and distinguishable. An attempt was there made to separate from one entire communication, a part of which was admitted to be privileged, certain statements upon the ground that the person making such, which were all made at the same time and in the same conversation, made part thereof in the character of an agent, and part as a witness, having personal knowledge of the facts so stated. This court held that under the facts therein, it was not practicable to make the separation, as it could not determine or distinguish which part was uttered as an agent, and which as a mere witness. No such difficulty arises in the question now under consideration. The statements made by Mrs. McDonald, at the house, in regard to the will appear to be as separate and distinct from what was previously said, as though they had been uttered at different times, and places.

Appellants complain of the ruling of the court in admitting in evidence certain statements or declarations of the testator made to John M. Butler, shortly before the death of the former, relative to the contents of his will, and also in refusing to give instruction number ten asked by them, and in giving, on its own motion, instruction number eight. The will in contest bears

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date of August 26, 1890. It appears to have been conceded by both parties in this action, that a will was duly executed at his, the testator's, law office at Indianapolis, on that day, which was attested by two witnesses, Snow and Daniels, but at this point the lines of concession seem to diverge. The contention of the appellees seems to be that the will executed on that day was the one that had been lost or stolen, and that the will in contest was a false one substituted in the place of that which had been lost, and appellees further claimed that they were each interested as devisees in the lost or stolen will. This, under the pleadings, and at the trial, was denied by appellants, and they contended that the probated will was the genuine will executed on the date mentioned.

The only essential difference, as alleged, it appears in the will found after the death of the testator and in contest, and the one claimed to have been lost, is that in the former Mrs. McDonald was given the Washington street property, in fee simple, while in the latter she was only given a life estate therein. John M. Butler, it is conceded, for years prior to the death of the testator, was his confidential friend and law partner. At the time of the last sickness of the deceased, and about ten days before his death, and when the testator seemed to think that death would be the probable result of his sickness, Butler called at his house to see him, and in a conversation there, had in the absence of Mrs. McDonald, after talking over his business with Butler, the testator said to him substantially as follows: "I have made a will, and want to tell you all about its contents, and where you will find it, so if I die, you can find it and turn it over to the executor." He then stated where the will would be found, and proceeded to state its contents as follows:

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“I have given a life estate in the Washington street property to Mrs. McDonald, with the fee to “Jessie,” “Joe” and “Mack” (meaning appellees). I have given to Mrs. McDonald all of my private library, household furniture, bric-a-brac, paintings, and all of my household goods. I have given to Scott (meaning appellee, Malcolm S.), if he becomes a lawyer, my law library and gold watch.” He then requested Butler to repeat over to him the contents as he had just stated them, which he did, and the testator then said: “You have got it all right. You understand it perfectly.”

These declarations of the testator the court permitted this witness to give to the jury. Appellants at the time objected to them being admitted as evidence, upon the grounds that there was no issue upon mental incapacity, and second, that they were not admissible for showing the contents of a lost or destroyed will, because there had been no evidence of the execution of any such will. But upon appellees stating to the court that there would be evidence of the execution of the alleged lost will, the objection was overruled. The contention of the learned counsel for appellants is, that these declarations went to the jury for all purposes, and upon all the issues in the case, without limitation. It is settled in this State that the declarations of a testator, made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud, or undue influence. *Runkle v. Gates*, 11 Ind. 95; *Hayes v. West*, 37 Ind. 21.

But it is evident, we think, from the instructions of the court to the jury, that the declarations were admitted in evidence, and the jury permitted to consider them for the purpose only of showing the contents of the alleged lost or destroyed will, and whether, if such

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a will ever existed, it remained unrevoked at the death of the testator.

We recognize as a settled principle of law that where the testator retains the possession or control of his will, and at or after his death it is not found, or is found thereafter in a mutilated or defaced condition, the presumption arises that he destroyed or mutilated it for the purpose of revoking it, but this presumption may be rebutted by evidence. It is insisted by appellees that these statements were proper to go to the jury :

First, to rebut the presumption that the lost or destroyed will in question had been destroyed by the testator *animo revocandi*. That appellees, having brought their action as devisees under such a will, the burden was cast upon them to rebut such presumption.

Second, that they were also admissible to show the contents of the lost will in order to establish that appellees were interested in the estate as devisees or legatees, that being the capacity in which they sued. This contention of appellees, we are of the opinion, must be sustained. As we have herein held, appellees based their right to contest the probated will upon the alleged facts, showing that they were interested as devisees in the genuine will which they alleged had been lost or destroyed, and that the same had not been destroyed by or through the agency of the testator. This they were required to sustain by evidence upon the trial, or fail in their action. The proposition is not controverted, and is settled, we think, that where a will is shown to be lost or destroyed, secondary evidence of its contents, when necessary, may be received. *Clark v. Wright*, 3 Pick. 67; *Brown v. Brown*, 92 Eng. Com. L. 875, and other authorities support this rule.

The best secondary evidence in existence, under this rule, must be produced. The proposition that these dec-

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larations made to Butler by the testator were admissible to rebut the legal presumption arising from the fact as claimed that the lost, stolen, or destroyed will in controversy at the date of the testator's death was in his possession or under his control, had not been revoked by him, is supported by the following authorities: *McBeth v. McBeth*, 11 Ala. 596; *Conoly v. Gayle*, 61 Ala. 116; *Morris v. Swaney*, 7 Heisk. 591; *Lawyer v. Smith*, 8 Mich. 411; *Hope's Appeal*, 48 Mich. 518; *Betts v. Jackson*, 6 Wend. 173; *Everett v. Everett*, 41 Barb. 385; *Foster's Appeal*, 87 Pa. St. 67; *Pickens v. Davis*, 134 Mass. 252; *In Re Johnson's Will*, 40 Conn. 587; *Patten v. Poulton*, 1 Sw. & Tr. 55; *Keen v. Keen*, Law Reps. 3 P. & D. 105; *Usticke v. Bawden*, 2 Addams, 116; *Welch v. Phillips*, 1 Moore P. C. 299; *Battyl v. Lyles*, 4 Jur. (New Series) 718; *Finch v. Finch*, Law Reps., 1 P. & D. 371; *In Bonis Barber*, Law Reps., 1 P. & D. 267; *Whiteley v. King*, 112 Eng. Com. L. 756.

That the statements or declarations of a testator may be received in the absence of evidence of a higher character to prove the contents or provisions of a lost or destroyed will, finds support in the following English and American authorities: *Sugden v. Lord St. Leonards*, 17 Eng. Rep. (Moak's notes), 453 and 542; *Gould v. Lakes*, Law Rep., 6 P. D. 1; *Burls v. Burls*, Law R., 1 P. & D. *472; *In Bonis Barber*, Law R., 1 P. & D. 267; *Johnson v. Lyford*, Law R., 1 P. & D. *546; *Battyll v. Lyles*, 4 Jur. (New Series) 718; *Finch v. Finch*, Law Rep., 1 P. & D. 371; *Davis v. Davis*, 2 Add. 223; *Keen v. Keen*, Law Rep., 3 P. & D. 105; *Pickens v. Davis*, 134 Mass. 252; *In the matter of Page*, 118 Ill. 576; *Hope's Appeal*, 48 Mich. 518; *In Re Lambie Estate*, 97 Mich. 49; *Foster's Appeal*, 87 Pa. St. 67; *Connolly v. Gayle*, 61 Ala. 116; *McBeth v. McBeth*, 11 Ala. 596; *Morris v. Swaney*, 7 Heisk. 591; *Reel's Exr. v.*

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Reel, 1 Hawks. (N. C.) 248, 268; *Howell v. Barden*, 3 Dev. 442; *Simms v. Simms*, 5 Ired. (Law) 684, Theobald "Law of Wills," pp. 42, 43; Floods "Wills of Personal Property," pp. 425, 429, 432; Walkem Wills, p. 360; 1 Jarman Wills (5th Bigelow's Ed.), pp. 130, 133, 134, 142 and notes, 268; Stephen's Digest of Evidence, article 29, 5 Am. and Eng. Ency. of Law 368 (f); 7 Am. and Eng. Ency. of Law 73

As settled by some of these authorities, such statements of the testator should be received as evidence with great caution; for the reason that they are sometimes made by him for the express purpose of misleading or satisfying curious friends or expectant relatives. But the declarations in the case at bar are not open to this objection; they were voluntarily made to a confidential friend, one who apparently had no interest in the estate of the testator, and not in response to any inquiry by him made. Considering the circumstances under which they were made by the testator at a time when sick, but in the full control of his mental faculties, and when he seemingly recognized that his death was a near probability, and they appear to us to bear upon their face the very impress of sincerity. We think they were clearly competent for the purpose for which as it is claimed by appellees they were introduced.

If the declarations of the testator are legitimate evidence to prove the contents in a proceeding to have a lost will admitted to probate, which the authorities, we think, seem to fully authorize and support, in reason they must be equally so under the issues in the case at bar, to show the contents of the lost will in question, in order that the interest of the appellees in the estate might appear, and the presumption of revocation rebutted.

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Instruction eight given by the court is as follows :

“It is conceded by both the parties to this suit that a will was duly executed by Senator McDonald at his law office in the city of Indianapolis, on the 26th day of August, 1890, and duly attested by the witnesses, Snow and Daniels ; but the plaintiffs charge that said genuine last will and testament was removed, lost or stolen without the knowledge or consent of said testator or the plaintiffs, and the will now in contest substituted and foisted in the room, and in place of said genuine will. The defendants deny this charge and aver that the will in contest is the identical will so executed as aforesaid. Under this issue I have allowed the plaintiffs to introduce in evidence certain alleged declarations of said testator, relating to the contents of said will ; if you find that such declarations were made, you will only consider them for the purpose of determining the character and contents of such alleged lost or destroyed will, and whether, if it ever existed, it remained unrevoked at the time of the death of the testator, no inference in support of the other issues and charges in this case can be drawn by you from these alleged declarations.”

At the proper time the appellants requested the court to give the following instruction, number ten, which was refused :

“If the jury shall find that Joseph E. McDonald in his last sickness made certain declarations touching the contents of his will, as testified to by John M. Butler, Esq., then the court instructs you that such declarations or statements of Senator McDonald cannot be considered by the jury in determining the question of the genuineness of the will in contest. For the law is, “A testator’s own declarations to prove that a will, apparently regular, was forged * * * are hearsay and inadmissible.”

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It is contended by appellants that instruction No. 8 given by the court was not sufficiently clear and explicit in limiting the jurors in the consideration of the declarations in question, and that, hence, No. 10, as requested, should have been given. It is well settled by repeated decisions of this court that it is not error for the trial court to refuse an instruction requested, although accurately stating the law, if the same proposition is substantially given in another instruction. In the eighth instruction the court called the attention of the jury to the declarations admitted in evidence, and stated that these should only be considered to determine the character and contents of the alleged lost or destroyed will, and whether if it ever existed it remained unrevoked at the time of the testator's death. Not content with this, the court proceeded further and impressed upon the jury the fact that they were prohibited from drawing from this evidence any inference in support of the other issues and charges in the case. The declarations of the testator, for the same purpose, were testified to by James D. McDonald, a witness for appellees, and the court in this instruction intended to, we suppose, and did embrace his evidence, as well as that of Mr. Butler's, and in this respect, at least, the instruction was more favorable to appellants than the one requested, as that singled out the declarations made to Butler only in the testator's last sickness. We are of the opinion that the court embodied in its instruction all that was substantially necessary for the information of the jury as to the manner in which they were to apply and consider these declarations. We cannot presume that intelligent jurors, where evidence has been admitted for a certain purpose, will consider it upon other issues, or for other purposes, when the court has expressly stated

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to them that they must not do so. It must be presumed that the jury obeyed the court's injunction.

There was no error in refusing the instruction asked by appellants.

The next question presented and argued by appellants in their brief is that the court erred in not allowing the appellant, Mrs. McDonald, to testify in regard to the circumstances under which the carbon or black will, claimed to be a duplicate of the will in contest, came into her possession. It was apparently admitted that this had reference to a matter which occurred during the life of the testator. As this was a matter occurring prior to his death, and she being a party to the issues involved, we think, she was not competent to testify respecting things not open to the observation of all the friends and acquaintances of the deceased, by reason of the prohibition of section 499, R. S. 1881 (section 507, R. S. 1894). We must construe this section as applicable to parties, as witnesses, in an action to contest the will, the exception being that stated in *Lamb v. Lamb*, 105 Ind. 456, namely, that parties are only competent to testify in respect to such matters as were open to the observation of all the friends and acquaintances of the deceased ancestor. Counsel for appellants insist that the action was not founded upon a contract or demand against the ancestor, and for that reason the section 499, *supra*, could have no application. But the word "*demand*," as used in this statute, has been held to be one of broad meaning; and it may well be held to apply to an action by or against devisees in relation to a will of the ancestor. To say the least, however, the ultimate object of a *suit* to contest a will is to *affect in some manner the property of the ancestor*. Suits to contest a will, we think, come clearly within the spirit and meaning of this section, if not within its

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express letter. *Peacock v. Albin*, 39 Ind. 25 ; *Wiseman v. Wiseman*, 73 Ind. 112 ; *Staser v. Hogan*, 120 Ind. 207 ; *Larch v. Goodacre*, 126 Ind. 224. .

It was apparently sought to be shown by Mrs. McDonald that the transaction under which she came into possession of the black or carbon duplicate of the will in suit, was connected with the deceased, and was confined to her and him alone. Both parties to the action were permitted by the court to testify in respect to the genuineness of the signature of the testator, and Mrs. McDonald was also permitted to testify that from the time of her husband's death until the date when she was examined as a party by order of court, this carbon will had been in the safety vault at the bank, but she was not allowed to testify that when she got the will out of the vault it was in an envelope, nor where this envelope was immediately upon the happening of the testator's death. The trial court seems to have excluded this last evidence upon the grounds that the envelope inquired about was not produced along with the will under the order of court. Whether the court erred in excluding this we need not consider, for the reason that counsel for appellants have failed to establish to our satisfaction that the evidence was relevant or material, and therefore the error of the court's ruling, if any, does not affirmatively appear. Some objections are made to a question which the trial court permitted appellees to put to Mr. Ewell, a witness called by them as an expert upon handwriting. The witness after stating the facts showing him to be an expert, and also giving to the jury facts which he had discovered, and peculiarities observed, in regard to the signatures in question by an examination which he had made, was allowed by the court over objections of appellants, to answer this question : "From the examination which you have made

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of these two documents (the green and black will), what is your opinion as to whether the signatures appearing to them are genuine?" He answered; "That they were not genuine." The grounds of objections urged, are that an expert witness must testify either from facts stated by himself to the jury, or from those testified to, or to be testified to, by other witnesses, and put to him in the form of a hypothetical question. This latter condition has no application, as the opinion of the witness was not sought upon a hypothesis. We do not think that the question is open to the first objection, as we think the question fairly imported and must have been so understood by the witness and jury that the opinion asked for was one based upon the facts derived by him from his examination made, all of which has been detailed by him to the jury. The witness was not asked to give his opinion from what he supposed he knew, but from facts testified to by him, and, hence, the rule laid down in *Burns, Exr., v. Barenfield*, 84 Ind. 43, does not apply. There was no error under the facts as they appear, in allowing the witness to answer this question.

Some exceptions and criticisms are urged upon the refusal of the court to give upon the question of forgery instructions number thirteen, fourteen and fifteen, requested by appellants. On this question the court instructed the jury in its instruction number nine as follows:

"I will now direct your attention to the law bearing upon the charge of forgery as made in this case; in civil as well as in criminal actions, the law indulges the presumption of innocence and fair dealing in all transactions; in this particular case the law presumes that the signatures to the will in contest are genuine, and not forged, and that the defendant is innocent of all

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criminal conduct in relation thereto. In criminal charges the presumption of innocence must be overthrown, and guilt proven beyond a reasonable doubt, in order to secure a conviction; but in civil cases, like the present, involving a charge of criminality, the rule of proof is different and not so strong. For the plaintiffs to recover upon the charge of forgery, they are not compelled to prove the charge beyond a reasonable doubt, but the law is satisfied, and you must be, if the charge is proven by a fair preponderance of the evidence, that is, the evidence in favor of the forgery must overcome the presumption of innocence, and all countervailing evidence of genuineness."

Upon an examination of instructions thirteen and fourteen refused, we are of the opinion that the court did not err in so doing. Everything as a matter of law relative to the question of forgery, under the pleadings to which appellants were entitled as of right, is substantially and clearly given in the instruction nine, therefore under the firmly settled rule appellants have no just grounds of complaint.

By instruction fifteen the court was asked to charge that "The failure on the part of the plaintiffs to either allege in their complaint, or point out in the evidence, any person as the person who committed the alleged forgery or procured the same to be committed, was a circumstance proper to be considered in connection with the other facts tending to disprove the charge of forgery." It cannot be seriously contended that appellees, in order to set aside the probated will upon the grounds that it was a counterfeit, were required to specifically allege in their complaint, and point out in the evidence, the identical person whose hand had perpetrated the forgery. There was no attempt by reason of this action to convict any one of the crime of forgery. Their failure to do

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that which was not required in order to maintain and succeed in their action, could not be considered as a circumstance against them. The instruction is also apparently faulty because it assumed the failure to point out in the evidence, as an actual fact, regardless of the evidence upon that question, and the action of the court in refusing to give it was correct. Complaint is also made for the reason that the court refused to give instruction number nine relating to the probative weight of expert testimony. We think, however, that the jury was sufficiently instructed on this point in the instruction given by the court on its own motion.

The jury on the trial returned a general verdict for the plaintiffs, and by their answer to interrogatories found that the will in contest had not been executed by the testator.

When the court came to enter its judgment upon the verdict, the appellant, Mrs. McDonald, demanded that the lost or destroyed will mentioned in the amended complaint should be adjudged as established by the decree and probated. This the court refused to do. An extended argument is presented upon this question by counsel, *pro* and *con*. As we have held that by the theory of the complaint it was not contemplated to establish and probate the alleged lost will, and as the appellant was not demanding any such relief by any pleading in the case, it is evident, we think, that there were no grounds for such a demand. We do not wish to be understood, however, as deciding that the lost will in question could, or could not have been established and probated in this action.

As to whether this will can be established by either party in a subsequent proceeding is not a question now before the court. Other questions are referred to by counsel for appellants, but as they are not presented

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with any apparent earnestness, and as it does not affirmatively appear by the record that appellants were prejudiced in their rights by the rulings of the court thereon, we do not deem it necessary to specifically mention them and thereby extend this opinion.

Owing to the importance of this case, and the questions involved, we have given it a patient and careful examination, and are satisfied that no error of the trial court appears that would justify a reversal. It is therefore adjudged that the judgment be affirmed.

Filed September 19, 1895.

No. 17,228.

BUNDY v. SUMMERLAND, TREASURER WABASH COUNTY.

142	92
152	97

142	92
169	656

INJUNCTION.—*Complaint. Necessary Allegation.—Taxes.*—The complaint in an action to enjoin the collection of taxes, part of which are admitted to be legally due, must allege that a tender of such amount was made, and that it was kept good by paying the same into court. (See note at end of opinion.)

From the Wabash Circuit Court.

W. H. Carroll and *G. D. Dean*, for appellant.

A. Taylor, for appellee.

MONKS, J.—This action was brought by appellant to enjoin the appellee, as county treasurer, from collecting certain taxes. It appears from the complaint that appellant was charged on the tax duplicate in the hands of appellee with \$129.00, of which \$15.00 is legally due, and the remainder is claimed to be illegal, for the reason that the real estate on which it was assessed was exempt from taxation.

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There was a demurrer to the complaint, which was sustained, and judgment rendered for appellee.

The sufficiency of the complaint is the only question presented. It clearly appears from the complaint that a part, at least, of the taxes which appellee was attempting to collect was legally collectible.

It is settled in this State that if a part of the tax charged on the duplicate against a party be legal and a part illegal, that which is legal must be first paid, or tendered to the treasurer before an action to enjoin the collection of the residue can be maintained. *Board, etc., v. Dailey*, 115 Ind. 360; *City of South Bend v. University of Notre Dame du Lac*, 69 Ind. 344; *Smith, Treas. v. Rude Bros. Mfg. Co.*, 131 Ind. 150. It is averred in the complaint "that before the commencement of the action, plaintiff offered to pay the defendant the sum of \$15.00, assessed upon and against his personal estate, but the defendant refused to accept the same except as a credit upon the aggregate amount of said taxes so attempted to be collected. * * * That he is ready and willing to pay the taxes so assessed against his personal property when the same can be ascertained separate from said real estate."

These are the only allegations in regard to payment or tender.

It is urged that the tender as averred was conditional and therefore not sufficient. *Storey v. Krewson*, 55 Ind. 397; *Bowen v. Julius*, 141 Ind. 310.

It is also urged by appellee, that if it were admitted that the tender as alleged was sufficient, there are no averments in the complaint showing that the tender was kept good by paying the money into court. There was no dispute about the amount of the tax on the personal property; it was already ascertained and deter-

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mined before the alleged tender was made. The rule requiring the tax-payer to pay or tender all taxes due upon property owned by him, which is subject to taxation before he can enjoin the taxes claimed to be illegal, is a just and salutary one, and should be strictly enforced.

When a tender is made to a county treasurer, and is refused, the same must be kept good by paying into court when the complaint is filed, the amount legally due for taxes. This must be alleged in the complaint, or the same will not be sufficient to withstand a demurrer for want of facts. *Lancaster v. Du Hadway*, 97 Ind. 565, and cases cited; *Goss v. Bowen*, 104 Ind. 207; *Evansville, etc., R. R. Co. v. Marsh*, 57 Ind. 505; *Clark v. Mullenix*, 11 Ind. 532.

It is not necessary to consider the other objections urged to the complaint, as the same is not sufficient for the reason stated. The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed September 20, 1895.

NOTE. —The multitude of authorities on injunctions to restrain collection of illegal taxes are analyzed in a note to *Odmin v. Woodruff*, (Fla.) 22 L. R. A. 699.

No. 17,528.

STATE, EX REL. CULBERT, *v.* LINKHAUER.

OFFICE AND OFFICER. — *County Sheriff. — Eligibility. — Service Limited to Four Years in Any Period of Six. — Construction. —* One appointed sheriff in the place of the officer regularly elected for a second term of two years, who died after qualifying is not ineligible to hold after the end of such term, under Const., Art. 6,

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section 2, providing that, no person shall be eligible to such office "more than four years" in any period of six years, and Art. 2, section 11, providing that an appointment *pro tempore* to any office shall not be reckoned a part of the term in cases providing that an office shall not be filled by the same person more than a certain number of years continuously.

SAME. — *Sheriff.* — *Vacancy.* — *Appointee.* — *Tenure.* — No vacancy occurs in the office of sheriff, authorizing the appointment of another person, where the duly elected sheriff dies before taking oath of office, and one appointed to complete his predecessor's term of office is holding such office under R. S. 1894, section 7579, authorizing the filling of vacancies in such office by appointments which shall expire when a successor "is elected and qualified."

SAME. — *County Sheriff.* — *Power of County Commissioners to Elect a Successor to an Appointee.* — A board of county commissioners has no authority to elect a successor to an appointee to the office of sheriff, under R. S. 1894, section 7579, providing that such appointment shall expire when a successor is elected and qualified, who shall be "elected at the next * * * general election."

From the Jay Circuit Court.

J. W. Headington and *J. F. La Follette*, for appellant.

O. H. Adair and *J. M. Smith*, for appellee.

HACKNEY, J.—The appellant filed in the lower court an information in the nature of a *quo warranto* to oust the appellee from the office of sheriff of Jay county. A demurrer, for the want of sufficient facts, was sustained to the information, and that ruling is the only assigned error. The material facts presented by the information were that one Gillum was elected in 1892, to succeed himself in said office, and, after qualifying, he departed this life on December 22, 1892. On the 23rd day of December, 1892, the board of commissioners of Jay county appointed the appellee to the vacancy occasioned by the death of Gillum, and he gave bond, took the oath of office, entered upon the duties, and continued in the

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possession of said office, and occupied the same at the filing of the information. At the November election in 1894 John English was elected to said office, but before he had filed his bond, or taken the oath of office, he departed this life on, to-wit: November 7, 1894. Upon the theory of the existence of a vacancy, by reason of the foregoing facts, the board of commissioners of Jay county, in regular form, appointed the relator to fill such supposed vacancy, and he took the oath of office, tendered his bond, and demanded possession of the office, which demand was refused by the appellee.

There is no contention that the election of English, without his having qualified, had the effect to create a vacancy in the office, but it is insisted by the appellant that a vacancy occurred by reason of the expiration of the period for which the appellee was appointed, and that the appellee, holding in the second term and to the end of the fourth year, for which Gillum was elected, he was, under the constitution, ineligible to hold longer.

The office is an elective constitutional office, and the term of eligibility is limited in the following words: "No person shall be eligible to the office of * * sheriff more than four years in any period of six years." Const. Art. 6, section 2 (R. S. 1894, section 152). It is further provided by the constitution, however, that: "In all cases in which it is provided that an office shall not be filled by the same person more than a certain number of years continuously, an appointment *pro tempore* shall not be reckoned a part of that term." Const., Art. 2, section 11, R. S. 1894, section 92. It will be seen, therefore, that by the constitution, which created the office and the limitation upon the eligibility of the persons who may hold the office, the appellee, at the time of the relator's appointment, was not ineligible to continue in the office. See also *Gosman v. State, ex rel.*, 106 Ind. 203, and authori-

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ties there cited. In the absence of the provision that *pro tempore* appointees should not be affected by the general limitation, we should incline to the construction that the general limitation was upon the person, and had no such reference to the tenure as to permit the computation, against a *pro tempore* incumbent, of the time his predecessor had occupied the office. See *Gosman v. State, ex rel., supra*.

To ascertain the appellee's right to hold the office, it is important that we look to the source of his authority. The constitution makes no provision for the filling of vacancies in the office of sheriff, but provides that "Vacancies in county * * * offices shall be filled in such manner as may be prescribed by law." Const., Art. 6, section 9, R. S. 1894, section 159. Pursuant to this provision of the constitution, it has been provided by law that the board of county commissioners shall fill vacancies in the office of sheriff by appointments which "shall expire when a successor is elected and qualified, who shall be elected at the next general * * election * * proper to elect such officers." R. S. 1894, section 7579; R. S. 1881, section 5563. Not only do we find this legislative provision that the appellee's right to hold the office continued until his successor should be elected and qualified, but we find the following constitutional guaranty of that right: "Whenever it is provided * * * in any law which may be hereafter passed, that any officer * * * shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term, and until his successor shall have been elected and qualified." Const. Art. 15, section 3 (R. S. 1894, section 225). By the sanction of the constitution and of the law, the appellee's right to hold the office until his successor was elected and qualified, was guaranteed, and if not ineli-

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gible, and there is no resignation, death or other occurrence, creating a new vacancy, the relator could acquire no right to the office by an appointment from the board of commissioners. *State, ex rel., v. Harrison*, 113 Ind. 434, and authorities there cited. The power of the board was only to fill a vacancy, and no vacancy existing, their appointment was void.

The language of section 7579, R. S. 1894, *supra*, "and such appointment shall expire when a successor is elected and qualified, who shall be elected at the next general * * * election * * * proper to elect * * * " does not warrant the position contended for by counsel, that the *election* provided is by the board of county commissioners, and that the relator's selection was pursuant to the right of the board to elect. It is not necessary that we should define and discriminate between the words "appointment" and "election," for the language of the statute directs the election of an appointee's successor "at the next general * * election," which is understood only as meaning the election which, in the language of the constitution, "shall be held on the first Tuesday after the first Monday in November." Const., Art. 2, section 14, R. S. 1894, section 95. Further than this, we think it manifest that the words, "who shall be elected at the next general * * election," do not qualify or limit the duration of the appointee's holding, but they direct the time for the election of the appointee's successor. The appointee's holding is, by the plain provision of the statute, until such successor is elected and qualified.

There was no error in the ruling of the trial court, and the judgment is affirmed.

Filed September 20, 1895.

NOTE. —The question of a vacancy in office in case of the death of the officer-elect, before his term begins, is the subject of a note to *Kimberlin v. State, ex rel. Tow*, (130 Ind. 120), as reported in 14 L. R. A. 858.

Becker v. Tell City Bank et al.

No. 17,615.

BECKER v. TELL CITY BANK ET AL.

MORTGAGE. — *Foreclosure.* — *Junior Mortgagee.* — *Default.* — *Right of Redemption.* — A junior mortgagee of land, served with summons in an action to foreclose the first mortgage, who permits judgment by default to be entered because she did not understand the nature of the summons is not entitled to relief, where she allows the year of redemption to pass by after learning of the sale three months after its occurrence, without exercising the right to redeem.

SAME. — *Foreclosure.* — *Judgment by Default.* — *Proceeding to set Aside Default.* — *Essentials.* — A judgment by default will not be set aside on the ground that it was obtained through the excusable neglect of defendant, unless she further shows that she had a good defense to the action.

From the Perry Circuit Court.

S. H. Esarey, C. L. Jewett and H. E. Jewett, for appellant.

S. B. Hatfield, J. A. Hemenway and F. H. Hatfield, for appellees.

JORDAN, J.—Appellant filed her complaint in the lower court under section 396, R. S. 1881 (section 399, R. S. 1894), to be relieved from a judgment taken against her through alleged excusable neglect. The material facts, as they substantially appear from the complaint, are as follows: At and prior to the 31st day of October, 1892, the appellee the Tell City Bank was the owner and holder of a mortgage upon certain described real estate situated in Tell City, Perry county, Indiana. This mortgage was executed by one Alois Becker and wife to secure notes held by the bank. At the same date appellant was the holder and owner of a duly recorded mortgage and judgment, both of which

were liens upon said realty, but junior to that of the bank's mortgage. On said 31st day of October appellee commenced an action in the Perry Circuit Court to foreclose its mortgage, to which action appellant was made a party defendant, by reason of her being a holder of the aforesaid liens. She, failing to appear to said action, was defaulted.

A judgment or decree was entered foreclosing appellee's mortgage, whereby appellant's equity of redemption in and to the mortgaged premises under her said liens was decreed as barred. The record in said foreclosure proceeding recites that the appellant was duly served with a summons, etc. It is alleged that at the time of the commencement of that action appellant was a German woman, unable to speak, read or understand the English language; that she was fifty-five years of age, in poor health, and had no experience or knowledge of the proceedings of courts, in relation to the foreclosure of mortgages; that if she was served by a copy of the summons to appear in said cause she has no knowledge thereof; that if the summons was read to her, it was read in the English language, and she did not understand it. It is further shown that the mortgaged realty was, on the 17th day of December, 1892, sold under the bank's foreclosure judgment at sheriff's sale, and the same was purchased by the appellee Huthsteiner as the cashier of the bank. Appellant avers that she had no knowledge of the pendency of said action until after the sale of the land, which fact she ascertained some time in the following February. A demurrer was sustained to the complaint for insufficiency of facts, and this action of the court is assigned as error.

Conceding, without deciding, that the allegations in the complaint sufficiently sustain appellant in this action in her failure to appear to the action in question upon

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the grounds of excusable neglect, this alone, however, is not sufficient to entitle her to the relief sought by her complaint. She was also required under the rule firmly settled by repeated decisions of this court to further show by her pleading that she had a specific, pertinent and good defense thereto. *Slagle v. Bodmer*, 75 Ind. 330; *Lee v. Basey*, 85 Ind. 543; *Nichols v. Nichols*, 96 Ind. 433.

There is an entire absence in the complaint of any facts tending to show that appellant had any defenses to the action if she had appeared in court in response to the summons served upon her, whereby the senior lien of the bank could have been defeated in whole or in part. The only effect of the judgment rendered against the appellant upon her default (as there is nothing appearing to the contrary), was to bar her equity of redemption as a junior incumbrancer after the expiration of the statutory period. *Holmes v. Bybee*, 34 Ind. 262; *Coleman v. Witherspoon*, 76 Ind. 285. After appellant ascertained the fact that she had been made a party to the bank's action and judgment rendered against her upon default, and that the mortgaged premises had been sold by the sheriff in pursuance of the decree therein, over nine months still remained of the year allowed by the statute for her to exercise the right of redemption. This right she neglected to avail herself of, but stood by until after the expiration of the time allowed for redemption of the land from the sale on the bank's decree, and thereby permitted its title under said sale to become absolute by the sheriff's conveyance, and her junior liens upon the mortgaged realty were lost.

The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed September 20, 1895.

No. 17,380.

STATE, EX REL. BLAIR, *v.* WILSON.

142	102
142	120
142	102
154	693

MUNICIPAL CORPORATION. — *City.* — *Common Council.* — *Removing City Attorney from Office.* — *Statute Construed.* — A common council of a city had the power, after the first Tuesday in May, 1894, to remove a city attorney from office and appoint his successor, whether he was in office at the time of the passage of R. S. 1894, section 3476, or not, under the provision that city attorneys shall hold office for four years, subject to removal by the council at its pleasure, after the first general election on the first Tuesday in May, notwithstanding the provision extending the terms of city attorneys in office at the time of the passage of the act, until the first Monday of September, 1894.

From the Shelby Circuit Court.

Adams & Carter, for appellant.

Love & Morrison, for appellee.

MONKS, J.—The relator, Blair, filed an information against appellee in the court below, for the purpose of determining between himself and the appellee, which was entitled to the office of city attorney of Shelbyville. A demurrer was sustained to the complaint and the appellant refusing to amend, judgment was rendered in favor of appellee.

The only error assigned is that the court erred in sustaining the demurrer to the complaint.

As the question to be decided is one of statutory construction, it is necessary only to state such facts as will fully present that question.

The relator, Blair, was elected city attorney by the common council of the city of Shelbyville, on the 19th of May, 1891, and on the next day filed his bond, took the oath of office, and entered upon the discharge of his

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duties as such officer. At the time of his election it was provided by statute, section 3043, R. S. 1881, Acts 1877 p. 12, that the officers of such city should consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer, civil engineer, street commissioner and marshal and (if the common council deemed it expedient) a city attorney and a city judge; that the city attorney should be appointed by the council, and that all such officers should hold their respective offices for two years, and until their successors were elected and qualified, except that the city attorney, street commissioner and civil engineer were subject to removal at any time by the common council at its pleasure. *City of Madison v. Korbly*, 32 Ind. 74; *City of Madison v. Kelso*, 32 Ind. 79; *State, ex rel., v. Sohn*, 97 Ind. 101.

Before the expiration of the two years for which the re-lator was elected city attorney, the Legislature, by an act which took effect February 21, 1893, amended section 3043, R. S. 1881, *supra*, which amendment reads as follows: "The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, treasurer, civil engineer, street commissioner, chief of the fire department, health officer, marshal, and (if the common council deem it expedient) a city attorney and a city judge. The city attorney, the street commissioner, the civil engineer, the chief of the fire department, and the health officer shall be appointed by the common council: *Provided*, That the common council may dispense with the street commissioner and require the marshal to perform his duties. All such officers shall hold their respective offices for four (4) years, and until their successors are elected, or appointed, and qualified, those who are appointed by the common council being subject to removal by the council at its pleasure, after the first general election on the first Tuesday in

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May. Said officers shall respectively hold their offices as follows: The mayor, city judge, clerk, marshal and treasurer, four years each; and, *Provided*, That the term of the aforesaid officers shall commence on the first Monday in September following the general election in May, and that the terms of office shall be four years from such Monday in September; and, *Provided further*, That the mayor, clerk, treasurer, civil engineer, street commissioner, marshal, city attorney, city judge, chief engineer of the fire department, and health officer now in office, and whose terms expire in May and September, 1893, or at any other time, shall hold their respective offices until the first Monday in the month of September, 1894, and that all and each of such officers as shall so hold shall procure from their sureties a written consent to the aforesaid extension, or give a new bond to the satisfaction of the council, otherwise their term of office shall terminate in May or September of the original term for which they were elected or appointed, or at such time as their terms now expire. And the councilmen shall be elected by the legal voters of their respective wards; and the councilman from each ward whose term will expire in May, 1893, is hereby continued in office, and his term extended until May, 1894, and the councilman of each ward whose term would expire in May, 1894, is hereby continued in office and his term extended until May, 1896; and hereafter when two councilmen are chosen at the same time from the same ward it shall be determined by lot at the first regular meeting of the council after their election who shall hold his office for two years and who for four years, and biennially thereafter one councilman shall be elected by the legal voters of each ward. The term of councilmen shall be four years, and they shall be elected biennially. The successors of those whose terms are ex-

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tended until May, 1894, shall then be elected and their terms continued four years, and the successors of those whose terms are extended until May, 1896, shall then be elected and their terms continued four years; and all of said officers shall hold their respective offices during their respective terms and until their successors are elected and qualified. The said clerk, treasurer and marshal, with the consent of the common council, may appoint one or more deputies when necessary; *Provided further*, That the common council of a city governed by this act may order the election of an auditor who shall be elected as other city officers are elected, and shall hold his office for the term of four years, and until his successor is elected and qualified; and the common council shall have power to prescribe the manner of qualifying for such office, and to prescribe the powers and duties thereof, which shall in nowise conflict with the provisions of this Act: and, *Provided further*, That no person shall hold the office of councilman unless at the time of his election he is a resident of the ward from which he was elected; and in case of the removal of any councilman from the ward from which he was elected, the common council shall have the power to declare his office vacant and to elect his successor to fill such vacancy as provided by law. All officers who are not specifically named herein whose terms expire prior to the first Tuesday in May, 1894, at which date the first election under this amendment shall be held, are hereby continued in office until said time, and until their successors are elected and qualified, they to give new bond as the council may direct." Section 3476, R. S. 1894, Acts 1893, p. 50.

On the 2nd day of May, 1893, and while he was still in office, by virtue of such election, the relator filed with the common council the consent of the surety on his

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bond to the extension of the term of such office until the first Monday in September, 1894, as required by said act. On May 8, 1894, the common council of the city, without notice to the relator, by a proper vote, declared the relator removed from office of city attorney, and that said office was vacant, and proceeded to, and did elect appellee to said office. Afterwards, on the 15th day of May, 1894, appellee took the oath of office and filed his bond with sufficient surety, which was approved by the common council, and took possession of said office, and excluded the relator therefrom.

The only question presented for decision is, did the common council of the city have the power, under section 3476, R. S. 1894, Acts 1893, p. 50, *supra*, to remove the relator from the office of city attorney? Under section 3043, R. S. 1881, which was amended by section 3476, *supra*, the city council had such power, without any offense being charged, but simply at the pleasure of the council. *City of Madison v. Korbly, supra*; *City of Madison v. Kelso, supra*; *State, ex rel., v. Sohn, supra*.

It is claimed, however, by counsel for appellant, that the act of 1893, *supra*, by expressly extending the term of the city attorney until the first Monday in September, 1894, took away from the common council the power to remove such officer before that time, provided the consent of his surety to such extension was filed as required by said act, that the power of removal given by the amendment of 1893, *supra*, to the common council, applied only to such officers as they might appoint after the amendment took effect.

We cannot concur in this view. The purpose of the act of 1893, section 3476, *supra*, was to provide that the terms of office for all the city officers should be four years instead of two; to fix the time when such terms should commence and

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to extend the terms of the city officers then in office to conform to this change.

That part of the act of 1893, providing that the officers of the city should consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer, civil engineer, street commissioner, and marshal, and, if the common council deem it expedient, a city attorney and a city judge, that the city attorney should be appointed by the common council, is a re-enactment of section 3043, R. S. 1881. The section amended provided that the city attorney was removable by the common council at its pleasure, while the section as amended provided that such officer was removable by the common council at its pleasure after the first Tuesday in May, 1894.

The legislative intention is to be ascertained from an examination of the whole as well as the separate parts of the act, and the intention so ascertained will prevail over the literal import of particular terms, and in searching for this meaning the court will look to each and every part of the act, the circumstances under which it was enacted, the old law upon the subject and the evil, if any, to be remedied. *Lime City Building, etc., Assn. v. Black*, 136 Ind. 544, 555.

The act in controversy spoke from the time it took effect, and had reference, from that date to all officers then in office, as well as those thereafter to be elected or appointed unless the contrary is clearly and expressly stated.

We think it clear that after the act of 1893 took effect the common council had the same power to abolish or discontinue the office of city attorney if they deemed it expedient to have such office, as they had under the section amended. And if such power was exercised prior to the first Monday in September, 1894, the city

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attorney then in office, whether appointed before or after the amendatory act of 1893 took effect, would at once cease to be such officer. It is also clear that after the first Tuesday in May, 1894, the common council had the power to remove at its pleasure any person holding the office of city attorney, no matter when elected, and appoint his successor. Such power is expressly given by the amendatory act of 1893.

By the terms of said act, one councilman for each ward was to be elected on the first Tuesday in May, 1894, and that the act gave the common council, as constituted after such election, the power to remove the city attorney and appoint another, who would execute the line of policy it might adopt. This is clearly the policy of our form of government, for otherwise the common council would not have the power necessary to enforce the execution of its orders. *City of Madison v. Korbly, supra.*

The extension of the term of office of the city attorney to the first Monday in September, 1894, was subject to the right of the city council to abolish the office at any time, or remove the incumbent thereof at its pleasure, after the first Tuesday in May, 1894, and elect his successor.

It is only by such a construction that effect can be given to all the parts of said act and at the same time avoid any contradiction of terms.

If the extension of the terms of office of the city officers had the effect to place such officers beyond the power of the common council as claimed, then such officers could not have been removed for cause, upon charges preferred under the provisions of section 3101, R. S. 1881. *City of Madison v. Korbly, supra.*

No such construction should be given to the act unless

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the language is so plain as to leave no doubt that the Legislature so intended.

We find no error in the record.

Judgment affirmed.

HACKNEY, J., did not participate in this decision.

Filed September 24, 1895.

No. 17,457.

LEDBETTER ET AL. v. WINCHEL ET AL.

142	109
157	493

APPEAL. — *Jurisdiction.* — *Who Must be Made Co-Appellants.* —

Notice. — A co-defendant, against whom a decree is rendered, must, on appeal from such a decree by the other defendants, be joined with them as a co-appellant, and served with notice thereof, otherwise the appellate court acquires no jurisdiction of the appeal, under R. S. 1894, section 647 (R. S. 1881, section 653).

SAME. — *Dismissal.* — *Appellees.* — *Notice.* — An appeal in which one of the defendants, against whom the decree appealed from was rendered, is made an appellee, and is not served with the process issued by the clerk of the Appellate Court to bring the appellees into court, and in which there is no appearance for such appellee, must be dismissed.

From the Grant Circuit Court.

G. W. Harvey and *A. De Wolf*, for appellants.

R. T. St. John and *W. H. Charles*, for appellees.

MCCABE, C. J. — The appellee Winchel sued the appellants and her co-appellee, Samuel Moore, to foreclose a mortgage on certain described real estate in Grant county. Moore was defaulted. He was made a defendant because it was alleged he held a judgment lien on the mortgaged premises junior to that of the plaintiff's mortgage.

The only answer filed by appellants was a plea in

McMahan v. McMahan.

abatement, the issues formed upon which were tried by the court, resulting in a finding thereon against appellants, and they failing to plead over, there was a decree of foreclosure against all the defendants, including Moore. It is assigned for error that the trial court overruled appellants' demurrer to the complaint, overruled their motion for a new trial, and their motion to modify the decree. Moore, one of the defendants against whom the decree is rendered, is made an appellee and not a co-appellant with the appellant.

He was entitled to appeal from the judgment, and being a co-party to the judgment with the appellants he should have been joined as a co-appellant with them, and notice served on him as such which is an unofficial notice. Burns R. S. 1894, section 644, R. S. 1881, section 635; *Gregory v. Smith*, 139 Ind. 48; *Wood v. Clites*, 140 Ind. 472; *Benbow v. Garrard*, 139 Ind. 571. No such notice was served on him.

The appeal is therefore dismissed.

Filed June 5, 1895 ; petition to reinstate overruled September 24, 1895.

No. 17,231.

McMAHAN v. McMAHAN.

APPELLATE PROCEDURE. — *Assignment of Errors. — Estoppel. — Finding and Decree Entered as Asked for by Appellant.* — One who moves to substitute a new finding and decree in place of one already entered, and causes the same to be entered of record, which is done without objection or exception by any one, is precluded from assigning as error on appeal the overruling of a motion for a new trial and of a motion to modify the decree, both of which rulings were made before he procured the substituted finding and decree.

From the Hamilton Circuit Court.

McMahan v. McMahan.

Shirts & Kilbourne, for appellant.

R. Graham and Christian & Christian, for appellee.

McCABE, C. J.—The appellee sued the appellant for a divorce and alimony on the ground of cruel and inhuman treatment. The appellant filed a cross-complaint seeking to be divorced from appellee on account of her alleged misconduct, in failing to properly take care of his household and other failures. Upon the issues formed upon these two complaints, there was a trial by the court, resulting in a finding and judgment for the plaintiff awarding her a divorce and \$2,000 alimony, over appellant's motion for a new trial.

The appellant then moved the court to modify the judgment so as to adjudge and decree no more than the sum of \$1,000.00 for alimony, instead of \$2,000.00, which motion the court overruled. These rulings are assigned for error here. Afterwards the appellant moved the court to substitute a new finding and decree for and in the place of the one already made and entered by the court, and wrote it out in full, embodying such proposed finding and decree in his written motion therefor, and the court sustained his motion and substituted the new finding and decree, and caused the same to be entered of record precisely as appellant asked that it should be done. There was no objection or exception by any one to this action of the court, as there could not be any available objection or exception by the appellant, who succeeded in inducing the court to do precisely what he asked it to do. That was practically to set aside its finding and judgment previously entered, against which all his objections and exceptions now urged had been leveled and directed, and make a new finding and render a new judgment, against which he never made any objection,

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and took no exception. The appellant is in no position to complain of the judgment entered on account of the facts found not being sufficient to warrant a divorce. Because, aside from the fact that the finding and judgment were both made and entered at his request, he made no motion for judgment in his favor on the facts found, or for a new trial. The finding can only be regarded as a general one, and a motion for a new trial after the finding, is necessary to raise any question as to its correctness. A party who expressly asks that a designated ruling, finding or judgment be made or rendered, cannot avail himself of that ruling or action of the court, although it may be material and may be exhibited by the record. What a party expressly asks the court to do, when done, cannot be available as error, however erroneous such action may be without a violation of the plainest principles of the law. *Elliotts App. Proced.*, sections 626 to 630, and authorities there cited.

One cannot urge error in the proceedings leading to a judgment entered by consent. *Weander v. Johnson*, (Neb.) 60 N. W. Rep. 353.

The motion for a new trial having been overruled before the new finding and decree were made and rendered, if the same were subject to review, raises no question as to the proceedings and rulings leading up to the finding and judgment. Therefore there was no available error in overruling the motion. And the same is true of the motion to modify the decree by reducing the amount of alimony from \$2,000.00 to \$1,000.00. That motion was made and overruled before the new finding was made, and before the new decree was rendered.

We find no available error in the record.

Judgment affirmed.

Filed April 24, 1895 ; petition for rehearing overruled September 24, 1895.

Grimes v. Butsch et al.

17,634.

GRIMES v. BUTSCH ET AL.

GUARDIAN AND WARD. — *Ward Escaping From Another State to This. — Foreign Guardian Cannot be Mandated by Court of This State as to Education of Ward.* — A guardian residing in Missouri, who is an exemplary man in all respects, and furnishes the ward, who resides in such State, with opportunities for a good education therein, cannot be compelled in this State, to which State the ward is induced to run away by his sister, who is only twenty-two years old, and for other reasons wholly unfit to have the custody of such ward, to send the latter to school in another State, under Mo. R. S. 1889, section 5297, giving the guardian control of the person of the ward, and the care of his education, support, and maintenance.

From the Vanderburgh Superior Court.

C. L. Wedding, for appellant.

JORDAN, J.—This was an application under section 1107, R. S. 1881 (section 1121, R. S. 1894), by the appellant as the guardian of the person and estate of Frank M. Cooper, a minor, for a writ of *habeas corpus* against the appellee, to obtain the custody of his said ward, who was alleged to be restrained by the appellees, Nellie Butsch and husband. By their return to the writ issued upon the petition, appellees denied the allegations therein, and alleged and recited other facts tending to show that the appellant had neglected to discharge his duties as guardian, and was not fit to have the custody and control of the ward. A hearing by the court of the petition resulted in a finding against the guardian, and thereupon the court made and entered the following order and judgment:

“It is therefore ordered and adjudged by the court

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that the said Granville P. Grimes, the guardian of the said Frank M. Cooper, place the said ward in school at the military academy known as Riverview, located in the city of Poughkeepsie, in the State of New York, and that said guardian provide and furnish the necessary funds for that purpose out of the estate of his said ward in his hands, and that he do this without delay.

“It is further ordered by the court that said ward, Frank M. Cooper, be permitted by his guardian to spend the time of his vacation either with his sister, Mrs. Nellie Butsch, or with his guardian and relatives in Missouri, as he, the said ward, may prefer; and that said Granville P. Grimes pay the costs herein from the estate of his said ward.”

A motion for a new trial was filed, and while the same was pending the record recites that the court, being informed that the plaintiff had refused to carry out the order and judgment of the court first entered, did then order that the defendant, Nellie Butsch, sister of the ward, be and was authorized and directed to place said ward in said school at Poughkeepsie, New York, and that the ward's estate be chargeable with the expenses of his education at said school. To this order appellant objected and excepted, and thereupon his motion for a new trial was overruled, to which ruling he excepted.

The error assigned, and the questions here presented, arise upon the action of the lower court in overruling the motion for a new trial, and are based upon the evidence in the cause.

We have not been favored with a brief upon the part of appellees, and are not informed of the reasons, if any, which they urge to sustain the judgment below. The evidence, which is in the record, clearly establishes,

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the following facts :

That the appellant is a foreign guardian of the person and estate of Frank M. Cooper, a minor child of David L. Cooper, deceased; that appellant was appointed guardian of said ward by the probate court of Monroe county, in the State of Missouri, at which county the guardian then and still resides; that the father of said minor resided and died in said county of Monroe; that subsequent to the death of the father, the mother also died a resident of the aforesaid county, leaving the guardian as the only legal protector of this ward. That prior to the ward coming to the State of Indiana, he resided in said Monroe county, at the home of his guardian. There all his relatives reside, except the appellee, his married sister, who resides at Evansville, Indiana. And all of his estate, both real and personal, is situated in that county, and the guardianship is still pending, and under the control of the probate court thereof. This ward is an inexperienced youth of about seventeen years of age, easily susceptible to the influences of his sister, the appellee, who, as it appears from the evidence, is only twenty-two years of age, and for other reasons is wholly unfit to have the control or custody of her brother.

The evidence shows that the guardian is an exemplary man in all respects. That he was an especial friend of the boy's father; and accepted the appointment of guardian by reason of the father's request made in his last sickness. He provided the ward with a good home at his own house, placed him in the Missouri Valley College, at Marshall, Mo., for the purpose of giving him a good education. He was appointed guardian in 1885. The ward's estate at that time amounted to about twenty thousand dollars, and by the management of the guard-

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ian it has been increased until it amounts to over thirty-one thousand dollars. During the fall of 1894, through the persuasions of the appellee, Nellie Butsch, the ward was induced to run away from the school where the appellant had placed him, and come to Evansville, Indiana, to reside with her, at her home in said city. Appellant, together with a half-brother of the ward, came to Evansville to induce him to return. Appellee refused to permit the boy to leave, and informed the appellant that he dared not take her brother back to Missouri, and if he attempted to do so she would call upon the police to prevent it, and further stated that the matter must be settled in the courts.

The statute of the State of Missouri, which was in evidence, provides that "The guardian of the person, whether natural or legal, shall be entitled to the charge, custody, and control of the person of his ward, and the care of his education, support, and maintenance," etc.

Here is a mandatory, positive, and controlling law of the State, wherein the guardian and his ward are domiciled, and in the probate court of which State the guardianship is pending. The appellant's rights under this statute, in this respect, are higher than those of the relatives or friends of the ward. There are no reasons or grounds apparent from the evidence that would authorize or justify the trial court in denying to the appellant the rights relative to his ward granted to him by this statute. It cannot be controverted upon legal grounds, we think, that where, as in this case, the right of the guardian to the custody, control and education of his ward is clearly shown under the law, it is the duty of the court to yield thereto, and award to him this right. This right, although existing under the laws of a sister State, will be respected and enforced, upon a proper showing, by the courts of this State. If it were

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supposed that the custody of this ward and his care and education and the management of his estate should be changed, application therefor ought to be made to the proper court in the State of Missouri for an examination and determination of that question. The ward, under the facts herein, had no power to change his domicile by running away from his guardian in the State of Missouri and coming to this State. Appellant, as the guardian in Monroe county, Missouri, was entitled, under the law of that State, to have charge of this minor, in order to enable him to provide for his protection, maintenance, and education. It is manifest, therefore, that the finding and order of the court are not sustained by the evidence and are contrary to the law.

The judgment of the trial court is reversed at the cost of appellees, Christopher C. and Nellie Butsch, and the court is directed to sustain the motion for a new trial and to proceed in accordance with this opinion.

Filed September 24, 1895.

No. 17,451.

GOODWIN, CLERK OF CITY OF TERRE HAUTE, v. STATE,
EX REL. FOLEY.

142	117
142	699
143	117
154	485
154	693
142	117
160	581
160	582

MUNICIPAL CORPORATION. — *City Attorney. — Right of Council to Abolish Such Office. — Statute Construed.* — A city attorney in office at the time of the passage of R. S. 1894, section 3476, extending the term of attorneys in office at that time, cannot, by the performance of the condition of extension, prevent the abolition of such office before the expiration of the extended term, by the common council, under the authority implied from the fact that the creation of the office is left to its discretion.

Goodwin, Clerk of City of Terre Haute, *v.* State, *ex rel.* Foley.

SAME. —*City Attorney. —Removal of. —Statute Construed.* —A common council of a city had the power after the first Tuesday in May, 1894, to remove a city attorney from office, and appoint his successor, whether he was in office at the time of the passage of R. S. 1894, section 3476, or not, under the provision that city attorneys shall hold office for four years, subject to removal by the council at its pleasure, after the first general election on the first Tuesday in May, notwithstanding the provision extending the terms of city attorneys in office at the time of the passage of the act, until the first Monday of September, 1894.

From the Vigo Circuit Court.

J. E. Piety and J. O. Piety, for appellant.

T. W. Harper, V. J. Barlow, J. C. Foley and P. M. Foley, for appellee.

MONKS, J.—This was a proceeding brought by the relator, Foley, to compel, by writ of mandamus, appellant to issue a warrant on the city treasurer for salary alleged to be due him as city attorney for the quarter ending June 30, 1894.

An alternative writ was issued, to which appellant filed a return in four paragraphs; a demurrer was sustained to the second, third, and fourth, and the first paragraph being withdrawn, judgment was rendered that a peremptory writ of mandate issue commanding appellant to deliver the warrant as prayed for.

The only errors assigned and not waived, call in question the action of the court in sustaining a demurrer to the second and third paragraphs of the return.

It appears from the complaint and alternative writ that Foley was city attorney of the city of Terre Haute, February 21, 1893, when the act of 1893, extending the terms of office of city officers, took effect (section 3476, R. S. 1894, Acts 1893, p. 50), and that he complied with said act by filing a written consent of the sureties on his bond to such extension.

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The second and third paragraphs of the return are substantially the same. They allege in substance that on the 8th day of May, 1894, the common council of the city abolished the office of city attorney, for the reason that they deemed it inexpedient for the city to have and employ an attorney, and that the relator was duly notified of such fact, and never performed or rendered any service for said city, as such city attorney, after said date. That part of the act of 1893, section 3476, R. S. 1894, necessary to the decision of this question, is as follows:

“The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, treasurer, civil engineer, street commissioner, chief of the fire department, health officer, marshal and (if the common council deem it expedient) a city attorney and a city judge. The city attorney, the street commissioner, the civil engineer, the chief engineer of the fire department and the health officer shall be appointed by the common council; *Provided*, That the common council may dispense with the street commissioner, and require the marshal to perform his duties. All such officers shall hold their respective offices for four (4) years, and until their successors are elected, or appointed, and qualified, those who are appointed by the common council being subject to removal by the council at its pleasure, after the first general election on the first Tuesday in May. Said officers shall respectively hold their offices as follows: The mayor, city judge, clerk, marshal and treasurer, four years each; *and provided*, That the term of office of the aforesaid officers shall commence on the first Monday in September following the general election in May, and that the terms of office shall be four years from such Monday in September; *and provided, further*, That the mayor, clerk, treasurer, civil engineer, street

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commissioner, marshal, city attorney, city judge, chief engineer of the fire department and health officer, now in office, and whose terms expire in May and September, 1893, or at any other time, shall hold their respective offices until the first Monday in the month of September, 1894, and that all and each of such officers, as shall so hold, shall procure from their sureties a written consent to the aforesaid extension, or give a new bond to the satisfaction of the council, otherwise their term of office shall terminate in May or September of the original term for which they were elected or appointed, or at such time as their terms now expire."

Since the act, approved June 18, 1852, R. S. 1852, Vol. 1, p. 203, it has been provided by statute that the officers of a city should consist of a mayor, etc., and, if the common council deem it expedient, or, in their opinion, the interest of the city requires, a city attorney. Acts 1857, section 9, p. 44; Acts 1859, section 2, p. 208; Acts 1867, section 8, p. 35; Acts 1877, p. 12; section 3043, R. S. 1881; Acts 1893, p. 50; section 3476, R. S. 1894.

Under these acts the common council had the power to say whether or not a city attorney should be one of the officers of the city. If they deemed it expedient and elected one, they had the power at any subsequent time to abolish or discontinue the office. *State, ex rel., v. Wilson*, 142 Ind. 102; *Ford v. Board of State Harbor Com.*, 81 Cal. 19; *City Council of Augusta v. Sweeney*, 44 Ga. 463; 9 Am. Rep. 172.

The Legislature, by the act of 1893, section 3476, *supra*, did not create the office of city attorney within the full sense of the term, but authorized the common council to determine whether the city should have such an officer. The power that creates an office may abolish it before the expiration of the term of the officer, and from

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the date the office is abolished the officer is discharged. *State, ex rel., v. Hyde*, 129 Ind. 296, 302, and cases cited.

But it is claimed by appellee that by the proviso continuing the city attorney in office until the first Monday in September, 1894, the Legislature placed such officer beyond the power of the common council, provided he filed the consent of his surety to such extension.

We cannot concur in this contention of appellee. No such intent is stated in the section, and no such construction can be given it, unless such intention is expressed clearly and with unmistakable certainty. It is expressly provided that the city attorney and other officers named are subject to removal by the common council after the first general election on the first Tuesday in May, that is after the first Tuesday in May, 1894. The power of the common council to determine whether a city attorney shall be one of the officers of the city, was not limited to any particular time; the language is: "The officers of such city shall consist of a mayor, etc., * * * and, if the common council deem it expedient, a city attorney." The act took effect in February, 1893, and speaks from that date, and from that time the common council was given the power to determine whether a city attorney should be one of the officers of the city.

When we consider that the purpose of the Legislature was to make the terms of office four years, instead of two, and to fix a uniform time when such terms should commence, and that the terms of the city officers then in office were extended to conform to this change, the question becomes one of easy solution.

In the construction of a statute, every part of it must be considered in connection with the whole. And it must be construed so as to give effect to every word

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and clause, as well as the whole act, if possible. If different portions seem to conflict, the court must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory. *Barber Asphalt, etc., Co. v. Edgerton*, 125 Ind., pp. 460, 461, and cases cited.

Applying the rules of construction, it is evident that the Legislature, by the proviso in question, merely intended to extend the terms of office of the city officers then in office beyond the time for which they were elected or appointed, and not to place them above the power of the common council during such time. It follows that after the act of 1893 took effect, the common council had the power to abolish or discontinue the office of city attorney; that the common council, at its pleasure, had the power, after the first Tuesday in May, 1894, to remove the city attorney from office (*State, ex rel., v. Wilson, supra*;) that the action of the common council, whether considered as an abolishment of, or removal from, the office, was valid, and the exercise of power given by the statute in controversy; that even if the common council had no power to abolish the office, the action taken was equivalent to a removal from office, and valid as such an exercise of power.

The court erred in sustaining the demurrer to the second and third paragraphs of return.

Judgment reversed, with instructions to the court below to overrule the demurrer to said paragraphs, and for further proceedings not in conflict with this opinion.

Filed September 25, 1895.

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No. 17,453.

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INDIANAPOLIS ET AL.

142	123
147	204
142	123
163	211

MUNICIPAL CORPORATION. — *Sewer.* — *Street Improvement.* — *Assessment.* — The construction of a sewer under a street as part of a paving improvement, is within the authority to improve streets, conferred by a city charter upon the board of public works, although authority so conferred is limited by a provision that the cost of street improvements shall be estimated according to the whole length of the street, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement per running foot, and the cost of constructing drainage sewers as such is required to be assessed according to benefits to, or the area of, the lands affected, where the sewer is a necessary part of the street improvement, and is not to be used to drain the abutting property.

SAME. — *Street Improvement.* — “*Resident Freeholders.*” — *Statute Construed.* — “Resident freeholders” within the meaning of a charter providing that after the confirmation of an original resolution for a street improvement, the same shall be conclusive on all persons, unless within ten days thereafter “two-thirds of all the resident freeholders upon the street” remonstrate against it, means resident freeholders upon the street, and not simply residents of the city, owning property on the street.

From the Marion Circuit Court.

Miller, Winter & Elam, for appellant.

J. E. Scott, for appellees.

HOWARD, C. J.—This was an action for injunction, arising under a construction of the city charter of the city of Indianapolis. The assignment of errors presents for consideration the correctness of the court’s rulings in sustaining the several demurrers of appellees to the appellant’s amended complaint.

From the complaint it appears that on the 11th day of May, 1894, the board of public works of the city of

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Indianapolis adopted a resolution for the improvement of a part of West Washington street in said city, upon which appellant's real estate is situated, "by grading and curbing, and paving the roadway with brick on concrete foundation, and constructing drains or sewers and appurtenances thereto, according to the drawings and specifications set out in said resolution;" that notice of said resolution was duly given, that remonstrances thereto were heard, and that on the first day of June, 1894, said resolution was confirmed by said board; that thereafter, within ten days, "two-thirds of all the freeholders, residents in the city of Indianapolis, owning property on such part of said street so to be improved, remonstrated in writing against such improvement; that said board, in disregard of said remonstrance, did not refer said matter to the common council of said city, but advertised for bids to do said work, and on July 6, 1894, did let the same to the appellee, Daniel Foley, who is now proceeding with the same; that in the plans, specifications, notices and contract for said work, there is included, as a part of the same work, and under the same contract, the construction underneath the part of said street so to be improved, for its whole length, a drain or sewer for the pretended purpose of carrying off the surface water from said street, which may fall thereon or flow thereon from neighboring property and cross streets." Said drain or sewer is constructed of brick, is of varying size, from two to two and one-half feet in diameter, and is sunk from four to nine feet beneath the street, another drain pipe also, of smaller size, is placed under said street; that the additional cost of said improvement, caused by the construction of said drain or sewer, will be from twenty-

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five to thirty per cent. of the entire cost; that there is no provision in the statute for the construction of a drain or sewer, such as that here provided for; that whereas, the statutes provide that persons assessed for the construction of sewers may use the same, yet it is not permitted that the property-owners along said improvement use the sewer herein provided for; that there is no pretence that said drain is constructed under any of the provisions of the city charter, touching drains or sewers of any kind, but it is claimed by the board of public works of said city, and by the city engineer, that the same may be, and is to be, and is being constructed as an incident to, and a part of the street improvement; that is, as an incident to the paving of said street with brick, and according to the plans and specifications, and the declared purpose of said board of public works, and of said city engineer, the entire expense of such sewer or drain, or whatever it may be called, is to be charged upon and enforced as a lien against the abutting property along the line of said sewer, by the front foot, and not according to the superficial area of said property," and not according to any other method provided by the statute for paying the cost of the construction of sewers.

It is finally claimed that the building of such drain beneath the street as a part of such improvement, and charging the cost to the property-owners by the front foot, as in the case of street improvements, is without warrant of law, and should therefore be enjoined.

By section 74 of the act of March 6, 1891, as amended by the act of February 22, 1893, being the act for the government of cities having a population of more than one hundred thousand, and commonly known as the Indianapolis city charter (Acts 1891, 137; Acts 1893, 56;

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R. S. 1894, section 3845), it is provided that the costs of street improvements shall be assessed against abutting lands and lots, per running front foot, without regard to benefits to or area of such lands or lots.

By sections 83, 88, of the city charter, it is provided that the costs of the construction of sewers shall be assessed in certain cases according to benefits to, and in others according to area of, lands affected.

It is evident, therefore, that under the statute it would not be lawful to assess the costs of a sewer upon the abutting lands and lots by the running front foot.

The principal question in this case then is whether the drain described in the complaint is a sewer, as contemplated in the statute, or whether it is a part of the street improvement.

By section 59 of the charter (section 3830, R. S. 1894), the board of public works is given very full powers over the streets, alleys, and public places of the city, among others, "to design, order, contract for, and execute the improvement or repair of any street, alley or public place within such city."

By section 73 of the charter (section 3844, R. S. 1894), it is provided that: "Whenever the board of public works shall order the improvement of any street, alley, sidewalk or other public place in such city, in whole or in part, it shall adopt a resolution to that effect, setting forth a description of the place to be improved, and full details, drawings and specifications for such work."

What the improvement shall be is not defined by the statute. That is plainly left to the discretion of the board. The only limitation is found in the succeeding section, that the cost shall be estimated according to the whole length of the street or alley, "or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement," per running foot. Pro-

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vided, then, the improvement is uniform in kind and extent, the board must say by resolution what that improvement shall be.

The end to be attained, however, namely, the better preparation of the street for public travel, must evidently determine the nature of the improvement to be made. The mere grading of the street may be deemed sufficient in some instances. Afterwards, it may be thought necessary to raise the center or road bed, and sink gutters along the sides, so as to make a dryer and firmer highway. If the travel increases, graveling may be thought needful. Finally, the board may be of opinion that the street has become so important a thoroughfare that it should be paved with brick or stone. If the ground were low and wet, it would seem that, in connection with any of these improvements, it might be necessary to draw the water from the street by gutters, drains or otherwise, as the board should judge best.

In this case, as stated in plaintiff's complaint, the board, by resolution, expressed its judgment to the effect that said street should be improved "by grading and curbing, and paving the roadway with brick on concrete foundation, and constructing drains or sewers and appurtenances thereto."

The uniformity of the whole work, as well as the particular purpose of the drain under the roadway are likewise shown in the complaint, where it is said: "In the plans, specifications, notices, and contract for the said work, there is included, as a part of the same work, and under the same contract, the construction underneath the part of said street so to be improved, for its whole length, a drain or sewer for the pretended purpose of carrying off the surface water from said street which may fall thereon or flow thereon from neighboring property and cross streets."

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Certainly no purpose is here indicated but the improvement of the street. Indeed the complaint says elsewhere that the drain is not to be used as an ordinary sewer, no intersections or connections with house or other drains being permitted. It is therefore built exclusively for the improvement of the street, and not, except incidentally, as a sewer.

There can be no doubt that the board had power, under the charter, to make the improvement as provided for in the resolution. Indeed it would appear that the drainage of the street was a necessary part of the improvement. It may seem that it would have been better to have first constructed a sewer along the street, under the sewer provisions of the charter, and then lay the pavement under the provisions for street improvements; and doubtless this would be true generally. There is nothing shown, however, from which we may discover that the board abused its discretion in this case; and the course pursued, for aught that appears, may have been the wisest under the circumstances.

However that may be, it cannot be said that the draining of water from a street may not be a necessary part of the improvement of such street. And in this case, as we have seen, the board was of opinion that such drainage was necessary.

It has frequently been decided that a drain may be constructed in connection with other street improvements and as a part of the same. *Davies v. City of Saginaw*, 87 Mich. 439; *Murphy v. City of Peoria*, 119 Ill. 509; *Cone v. City of Hartford*, 28 Conn. 363; *Hastings v. Columbus*, 42 O. St. 585; *Bronson v. Borough*, 54 Conn. 513; 6 Am. and Eng. Ency. of Law, 19. See also, *Leeds v. City of Richmond*, 102 Ind. 372; 10 Am. and Eng. Ency. of Law, 282.

It is further contended that the board had no author-

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ity to let the contract, for the reason that, in compliance with section 73 of the charter (section 3844, R. S. 1894), and within ten days after the confirmation of the resolution ordering the work done, "two-thirds of all the freeholders, residents in the city of Indianapolis, owning property on such part of said street so to be improved, remonstrated in writing against such improvement."

The words of the statute are, that after the confirmation of the original resolution, the same shall be conclusive on all persons, "unless within ten days thereafter, two-thirds of all the resident freeholders upon such street or alley remonstrate against such improvement."

Counsel for appellant argue that "resident freeholders" here means residents within the city and owning property upon the street; while counsel for appellees contend that the words mean what they seem to say, namely, resident freeholders upon the street. We think the latter to be the evident meaning and intent of the law.

After the adoption, but before the confirmation of the resolution, provision is made for notice to property owners and others interested in or affected by the work, and for the hearing of remonstrances from them. Sections 73, 63, of the charter, sections 3844, 3834, R. S. 1894.

After the confirmation of the resolution, ten days additional are allowed during which resident property-owners upon the street may make further remonstrance. We do not think that a second remonstrance was intended for all persons within the city who might own property upon the street. The right to a second remonstrance was rather a favor to those most particularly interested, namely, the resident freeholders upon the street.

The terms resident freeholders within, near to, along or upon a given place, are frequently used in this and

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other statutes; and the meaning is usually limited to the locality so designated, unless some other signification is shown by the context.

In the statute for the opening and improvement of highways (sections 6742–6750, R. S. 1894; sections 5015–5023, R. S. 1881), similar provision is made in favor of freeholders residing along the line of the proposed improvement.

Other questions discussed by counsel need not, as we think, be considered. The injunction was properly referred.

The judgment is affirmed.

Filed September 25, 1895.

No. 17,325.

MICHENER ET AL. *v.* THE SPRINGFIELD ENGINE AND
THRESHER COMPANY ET AL.

INJUNCTION. — *Want of Equitable Jurisdiction. — Dismissal. — Action to Enjoin Execution and Judgment.* — A suit to enjoin an execution and judgment cannot be dismissed on the ground of a want of equity jurisdiction, because there is a remedy at law, where the same judge, under a reformed system of procedure, exercises both law and equity powers, and the facts show a right to legal relief, which can be granted on amendment of pleadings.

SAME. — *Against Judgment at Law. — Legal Remedy.* — An injunction against the enforcement of a judgment at law cannot be granted where there is a legal remedy by review, in a code proceeding which is as practicable and efficient.

PLEADING. — *Complaint for Review of Judgment. — Exhibit.* — A complaint for review of a judgment, under R. S. 1894, section 627, must set forth as an exhibit a complete transcript of the judgment, or so much thereof as is necessary to fully present the error complained of.

REVIEW OF JUDGMENT. — *Guarantor. — Indorser. — Promissory Note. — Statute Construed.* — An accommodation guarantor or indorser of a note is entitled to review a judgment against him, under R. S. 1894,

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section 627, without reviewing the judgment against the makers, where after the judgment against him the makers defeated the claim against them in the same action, on the ground of failure of consideration.

From the Howard Circuit Court.

Bell & Purdum, C. P. Pollard and Morrison & Holman, for appellants.

Blackledge, Shirley & Moon, for appellees.

MCCABE, C. J.—The appellant, James B. Michener, brought this suit against The Springfield Engine and Thresher Company, and Edgar A. Simmons, sheriff of Howard county, concluding with a prayer, to enjoin an execution and judgment against him, and for all just and proper relief and for satisfaction thereof. It appears from the complaint that John H. Kennedy, Benjamin E. Hockstedler and Christian Kly, as principals, on December 1, 1888, executed three several promissory notes, to the appellee company, amounting in the aggregate to \$415.00 in consideration of a sale to them by said company of a separator engine and thresher of its manufacture; that after the execution of said notes, appellant, Michener, wrote his name across the back of each as accommodation guarantor or indorser thereon; that after the maturity of the \$140.00 note, it was paid by said principals; that afterwards, the next note falling due, calling for \$137.50, said payee brought suit on both of the unpaid notes against the principals and appellant, as indorser, and on July 12, 1890, appellant was defaulted and judgment was rendered thereon against him for \$339.08, and costs taxed at \$21.90; that said judgment against him was based exclusively on his said indorsement of said notes; that Kennedy, Hockstedler and Kly appeared and thereafter made defense to said action, and at the March term

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of said court, for 1892, upon the issues duly formed between them and said company, a trial thereof resulted in a verdict and judgment in their favor, namely, that the consideration of said notes had wholly failed, and that said plaintiff company take nothing by their suit, and that said defendants recover their cost; that notwithstanding the full discharge of said principals, by said judgment, which remains in full force, the said company is trying to collect said judgment against the appellant, and to that end caused an execution to issue thereon for the aforesaid amount thereof, and the aforesaid amount of costs, less a credit of \$70.00, and placed the same in the hands of the sheriff of said county, Edgar A. Simmons, made a defendant in the complaint, which he still holds and threatens to levy on the property of appellant and to sell the same to satisfy said writ. The court overruled appellee's demurrer to the complaint, the demurrer being based on the ground of the alleged insufficiency of the facts in the complaint to constitute a cause of action. Appellees call in question this ruling by assigning cross-error thereon.

The appellee company moved the court to dismiss the cause for want of jurisdiction, which motion the court sustained and dismissed the cause for want of jurisdiction. This ruling is questioned by the assignment of errors by the appellant.

The ground upon which the learned counsel for appellees seek to support the action of the trial court is that this being an application to a court of equity for the extraordinary relief by the way of injunction, it has no jurisdiction of the cause, because the plaintiff had a plain and adequate remedy at law, and that he had such remedy at law; they cite, *Ross v. Banta*, 140 Ind. 120.

It was there held that a judgment by which the party recovering it had secured an unfair advantage, and wher-

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ever by accident, mistake, fraud, or otherwise, an unfair advantage has been obtained in the proceedings at law, and it is against conscience to make use of such advantage, a court of equity will restrain the party from making use of the same; and after judgment any facts which prove it to be against conscience to execute such judgment and of which the injured party could not avail himself in defense of the suit, will authorize the court to interfere by injunction, and restrain the party from enforcing the judgment. But we held in that case that the facts which gave rise to the appellant's right to relief occurring after the rendition of the judgment against him constituted material new matter under our code, authorizing a review, though it would not have authorized a review prior to the code. And that the remedy of review of a judgment at law authorized by the code was a remedy at law and was adequate and therefore denied the relief by injunction.

It is therefore contended by the appellee company that the discharge of the principals on the trial after the judgment against the surety were facts occurring after the judgment against the surety, constituting "material new matter discovered since the rendition of the judgment," and hence that entitled appellant to the remedy of review, excluding him from the right to the extraordinary remedy by injunction.

This contention granted would by no means justify the assumption that the trial court had no jurisdiction, and rightly dismissed the cause for want thereof. When the two jurisdictions of law and equity were separate, it might, under that system, when the plaintiff's cause of action stated by him in a court of equity, was of such a nature as that it fell within the exclusive jurisdiction of a court of law, the court of equity had no jurisdiction of the subject-matter and it could take no other action in the

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matter than to dismiss the cause for want of jurisdiction. This was so because courts of equity had no other powers than equity powers. Not so in our reformed system of procedure. Not only does the same judge under that system exercise both law and equity powers, but he exercises both legal and equitable jurisdiction and administers both legal and equitable relief in each case, when the facts pleaded and proved warrant it. How then can the cause be dismissed for want of jurisdiction merely because the plaintiff asks for equitable relief, while the facts show that he is entitled to legal relief? The court being clothed by the code with power and jurisdiction to administer both, or either legal or equitable relief in the same case, its jurisdiction is not and cannot be defeated by it appearing from the facts stated that the equitable relief sought cannot be awarded because such facts show that the only relief the plaintiff is entitled to is purely legal relief, and *vice versa*; nor is the jurisdiction defeated because the facts stated in the complaint are not sufficient to entitle the plaintiff to either legal or equitable relief. The remedy in such a case is a demurrer for want of sufficient facts. On the filing of such a demurrer the plaintiff may either amend his complaint pending the demurrer or he may amend it after the demurrer is sustained. By the dismissal of his cause the appellant was deprived of this right. If we could say that the complaint was so defective that it could not be so amended as to state facts sufficient to constitute a cause of action entitling the plaintiff to either legal or equitable relief, then we could very well hold that the result reached in the dismissal of the cause being the same that would have been reached in the sustaining of the demurrer, there was no available error, though the method of reaching the result was erroneous.

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This leads us to inquire whether this complaint was so defective in its statement of facts as that it could not have been amended so as to state a cause of action either legal or equitable.

It is not contended by the appellees that it might not be so amended.

The complaint states and the demurrer admits, that appellant was an accommodation indorser, a mere surety for Kennedy, Hockstedler, and Kly on the notes which were the foundation of the judgment against appellant, and that afterwards in the same action said principals defeated said notes against them on the ground of failure of consideration. In *Bridges, Admr., v. Blake*, 106 Ind. at page 335, it was said: "Upon its face the mortgage purported to be a contract of suretyship, and the general rule is that to enforce such a contract it is essential that the obligation against the principal must be subsisting. The extinguishment of the direct engagement of the principal, no matter how accomplished, extinguishes the collateral liability of the surety. *Baker v. Merriam*, 97 Ind. 539, and cases cited; *State v. Blake*, 2 Ohio St. 147; *Brandt Suretyship, etc.*, section 121."

But there are exceptions to this general rule. For instance, the discharge of the principal by the act of the law in which the creditor does not participate, will not release the surety. A familiar illustration of this rule is that the discharge of the principal in bankruptcy or under insolvent laws, on account of infancy, coverture or *non compos mentis*, does not discharge the surety. *Gregg v. Wilson*, 50 Ind. 490; *Post v. Losey*, 111 Ind. 74; *Brandt Suretyship, etc.*, section 126; 24 Am. and Eng. Ency. of Law, 773. This author at section 125 says, and we think correctly, that, "If the principal is discharged because of matters inherent in the transaction,

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even after judgment against the surety, the latter will be exonerated thereby."

But appellees' learned counsel contend that notwithstanding these principles entitling appellant to relief, he cannot invoke the aid of the extraordinary remedy of injunction for the reason that he had a plain, efficient, adequate, and complete remedy at law by a complaint to review on account of new matter arising since the rendition of the judgment against him in the defeat of the obligation against the principals. Citing *Ross v. Banta, supra*, in support of this contention. The judgment here involved being in the nature of a judgment at law, and as judgments at law can only be reviewed by virtue of the code, that remedy as was held in the case cited is a legal remedy.

But it is contended by the appellant that he is not bound to resort to the legal remedy if that remedy is not as practicable and efficient to the ends of justice and its prompt administration both in respect to the final relief and the mode of obtaining it as the equitable remedy; then the aid of equity and injunctive relief may be invoked.

That is the true rule in such cases. *Thatcher v. Humble*, 67 Ind. 444; *Bishop v. Moorman*, 98 Ind. 1; 1 Beach Injunc., section 32, and authorities there cited; *Kilbourn v. Sunderland*, 130 U. S. 514; *Lewis v. Cocks*, 23 Wall, 470.

And it is further contended by appellant that the legal remedy is not as practicable and as efficient as the remedy by injunction, because he contends that a complaint to review would require him to seek to review the whole proceeding, and thereby, if successful, he would open the whole case, not only the judgment against himself but the judgment in favor of and discharging his principals from liability on the notes. If that is so, then

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there could be no review at all of any part of the proceeding, because the only ground for saying that there is a right to review in appellant at all is on the ground of the new matter of the discharge of the principals in the notes after the judgment had been taken against the surety ; and if to review on account of that matter means to review the other judgments exonerating and discharging the principals from liability on the notes as well as to review the judgment against the surety thereon, then there is no ground for review whatever.

The statute provides that "Any person who is a party to any judgment, etc., * * * may file in the court where such judgment is rendered a complaint for a review of the proceedings and judgment." R. S. 1894, section 622 ; R. S. 1881 section 615.

Under this statute appellant was entitled to review the judgment against him without disturbing the separate judgment in the same proceeding in favor of his principals. The general prayer for relief was broad enough in this case to have justified the court in awarding the legal relief of a review of that judgment, and the facts stated in the complaint only lacked one element to entitle the plaintiff to the legal relief of a review, and that was to file a transcript of the record of the judgment referred to and described in the complaint. The facts stated did not entitle the plaintiff to equitable relief by way of injunction, because they show that he had an ample legal remedy by review but did not as before observed justify the dismissal. It did not state facts sufficient to warrant the legal relief by way of review, because it did not set forth as an exhibit thereto a complete transcript of the judgment or so much thereof as is necessary to fully present the error complained of. *McDade v. McDade*, 29 Ind. 340 ; *Comer v. Himes*, 58 Ind. 573 ; *Meharry v. Meharry*, 59 Ind. 257 ; *White-*

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hall v. Crawford, 67 Ind. 84; *Stevens v. City of Logansport*, 76 Ind. 498; *Funk v. Davis*, 103 Ind. 281. For that reason the court ought to have sustained the demurrer to the complaint and allowed the plaintiff to amend his complaint in this respect if he so desired. The judgment is therefore reversed, and the cause remanded, with instructions to overrule appellees' motion to dismiss and sustain the demurrer to the complaint with leave to the plaintiff to amend his complaint if he so desires.

Filed April 26, 1895; petition for rehearing overruled September 26, 1895.

No. 17,171.

REAMER ET AL. v. HOGG ET AL.

DRAINAGE. — *Portion of Benefits Never Assessed or Called for Cannot Be Applied to New Work.* — *Statute Construed, Section 5648, R. S. 1894.* — The portion of the benefits found to have resulted from the construction of a drainage ditch, never assessed or called for, for the construction according to the plans and specifications, cannot be applied to new work, under R. S. 1894, section 5648, providing for the expenditure of funds collected on assessments in excess of the amount necessary to complete the ditch for opening the channel or increasing the levee.

From the Allen Superior Court.

T. E. Ellison, for appellants.

Breen & Morris, for appellees.

HOWARD, C. J.—Section one of an act concerning the drainage of wet and overflowed lands, approved March 6, 1891 (Acts 1891, 299; R. S. 1894, section 5648), is as follows:

“That when the work of constructing any ditch or

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levee under the drainage laws of this State shall have been completed according to the original plans and specifications thereof, and there shall remain in the hands of the persons assessed for the construction of said ditch and the commissioner of drainage funds collected on assessments in excess of what was necessary to complete the same, any person interested in the same may file with the court a supplemental petition showing these facts and praying that such commissioner be required to expend the same, or so much thereof as may be necessary in deepening the channel or increasing the levee thereof at any point or points thereof whenever the same, according to the original plans and specifications, shall be insufficient to complete said drainage. Upon the filing of said petition ten days notice, as in civil cases, shall be given the persons assessed for construction of said ditch and the commissioner having said work in charge, and upon the hearing thereof the court shall determine the amount of money on hand as aforesaid, and order said commissioner to complete said work. Said commissioner shall cause said work to be carefully surveyed, and an estimate made of the work to be done, and contract therefor by letting the same to the lowest responsible bidder therefor, and require bond to be given by said contractor, as in other cases under the drainage laws of this State. Said commissioner shall pay the expense of said work as provided for under the drainage laws of this State, and in a like manner report his proceedings to said court."

Under the provisions of the forgoing statute the appellants on the 10th day of June, 1893, filed their petition in the trial court.

The facts of the case, as found specially by the court, and admitted to be substantially those alleged in the petition, are, so far as need be set out, as follows:

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On the 18th day of July, 1883, proceedings were begun in the court below for the construction of a ditch to drain certain lands in Allen, Huntington and Whitley counties.

After the taking of all steps required by law, the ditch, was established, and a commissioner appointed to superintend the construction, and collect the assessments.

The amount of benefits on account of the ditch as established by the court, was \$318,721.75. Of this sum the commissioner made assessments, aggregating fifty-five per cent., all of which were collected except a small sum now in process of collection.

On the 31st day of December, 1889, the commissioner made a report to the court that the ditch had been finished; and the court, after examining the report and hearing remonstrances thereto, approved the same and adjudged that the ditch had been fully completed according to the plans and specifications.

On the 7th day of November, 1891, the commissioner, having finished paying for said work, and having paid all costs and expenses thereof, except a small amount of court cost, filed his resignation, showing that he had no money in his hands. The court approved this report also.

The amount of the assessments so made and collected, being fifty-five per cent. of the benefits, was sufficient to and did pay for the construction of the ditch in full, and the said part thereof still in process of collection will be sufficient to pay all the costs and expenses still unpaid.

All of said sums so collected were expended prior to the filing of the petition herein, and there were then no funds collected on said assessments in the hands of the persons assessed for the construction of said ditch and the drainage commissioner in excess of what was necessary to complete the same.

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No part of the remaining forty-five per cent. of the benefits was ever assessed or called for, nor is the same necessary to pay for the construction of the ditch, according to the plans and specifications.

Upon the foregoing facts the court stated as its conclusions of law, that the petitioners were not entitled to have collected the balance of the benefits not assessed or called for, and not necessary for the completion of the ditch according to the plans and specifications and the expense incident thereto, for the purpose of enlarging said ditch or building levees thereon, as prayed for in the petition, and that the petition should be dismissed.

We are of the opinion that the findings and conclusions so made by the court present for consideration all questions raised on this appeal.

Counsel for appellees, in support of the conclusions of law, earnestly contend that the statute under which the petition for the supplementary work was filed, is invalid, as an attempt to authorize the appropriation for a new work of moneys raised and not needed for the old work; claiming that no more should have been assessed for the original work than was necessary for its completion, and that if, through error of calculation or otherwise, more had been assessed and collected than necessary, the excess belonged to the people from whom it had been taken, and should therefore be redistributed, *pro rata*, to those to whom it belonged. Citing *Cooley Taxation*, 664, 665; *Groesbeck v. City of Cincinnati*, 51 Ohio St. 365.

We do not think, however, that we need pass upon the validity of the act in question. We are of opinion that, whether valid or invalid, the statute did not authorize the petition in this case.

The petition asks to have a part of the uncollected forty-five per cent. of benefits applied to the new work

upon the ditch ; while the statute provides only for the application for such purpose “of drainage funds collected on assessments,” in excess of what was needed to complete the original work. The statute also requires that before granting the petition “the court shall determine the amount of money on hand.”

Not only does the petition in the case before us fail to show any funds collected and on hand, left after the completion of the original work, but the court expressly finds that there was no such money left ; that all of the sums collected had been expended prior to the filing of the petition.

Even, therefore, if in any case money left in the hands of the commissioner after the completion of the original work could be applied to such supplementary work as indicated in the statute and in the petition thereunder, still we do not think that the facts in this case would warrant any application of the statute. There was no money on hand, and assessments on the original benefits could be made only for the original work.

The judgment is affirmed.

Filed September 26, 1895.

No, 17,106.

VORDERMARK ET AL. v. WILKINSON ET AL.

APPEAL. — *Dismissal. — Necessary Parties Appellant. — Appellate Procedure.*— An appeal by a portion only of the defendants against whom a joint judgment is rendered will be dismissed, although the other defendants are made appellees, as they have a right to assail the judgment, and cannot do it in that character.

From the Allen Circuit Court.

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W. G. Colerick, for appellants.

T. E. Ellison, for appellees.

MCCABE, C. J.—The appellee Millie A. Wilkinson commenced an action in the circuit court against Henry P. Vordermark, Harry E. Vordermark, Lillian Ada Vordermark, Mary Maud Vordermark, the Fort Wayne and New Haven Turnpike Co., the Tri-State Building and Loan Association of Fort Wayne, Indiana, and John W. Vordermark, the above named appellant. The complaint alleged in substance that on March 27, 1893, the plaintiff had recovered a judgment in the Wells Circuit Court on a cross-complaint by her filed against Henry P. Vordermark for \$1,800 alimony. That on March 28, 1893, an execution issued on said judgment to the sheriff of Allen county, where plaintiff and defendants all reside, which execution was levied upon certain personal property of said Henry P., appraised at \$251.35. That on a demand by said sheriff upon him for money or property sufficient to satisfy said writ, said Henry P. refused to pay the same or turn out any property to satisfy the same or any part thereof. That he has property and money that should be applied to the satisfaction of said judgment, which he fraudulently conceals and withholds from the payment thereof.

That during the pendency of said action the said Henry P. and John W. Vordermark were the owners of a shoe store in said city of Fort Wayne as partners, under the firm name of E. Vordermark & Sons. That the stock of goods of said firm was worth \$2,000, over and above the indebtedness of the firm. That said Henry has sold, or agreed to sell, his interest in said store to said John W. Vordermark, for the purpose of defrauding and cheating the plaintiff out of the collection of her said judgment, which purpose was well known

to said John W. Vordermark. That the latter holds possession of said store and stock of goods, and refuses to turn the same out on said execution. That prior to the recovery of her said judgment, Henry P. and John W. had sixty shares of stock in the Tri-State Building and Loan Association, and since the recovery of said judgment they surrendered said stock, and each took instead thirty shares of said stock. That the sheriff has demanded of said Building and Loan Association that it surrender and turn over to him said stock to be levied on, by virtue of said execution, which said association refuses to do, though said stock is now in its possession.

That said Henry P. had $18\frac{1}{4}$ shares of the stock of the Fort Wayne and New Haven Turnpike Company, of the face value of \$50 per share, which he has refused to turn out on said execution. That John W. Vordermark is the president of said Turnpike Company, and, although requested, refused to turn out said stock, so that the same may be levied on to satisfy said execution. That Harry E. Vordermark, Lillian Ada Vordermark and Mary Maud Vordermark have personal property in their possession belonging to Henry P., their father, who claims that such property belongs to them, they being his infant children. That if any transfer thereof has been made to them in any way, the same is fraudulent, having been fraudulently made by said Henry P., and received by them for the purpose and intention of cheating, defrauding and delaying the plaintiff in the collection of her judgment.

Prayer for an order that each and all of said parties deliver said property, fraudulently delivered or conveyed to them, and that said Henry P. Vordermark be required to turn over to said sheriff all money and property in his possession. This complaint was verified by affidavit of the plaintiff.

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Separate demurrers of all the Vordermark defendants to the complaint were overruled. All the defendants filed separate answers, leading to the formation of issues upon the complaint and answers.

A trial of such issues by the court without a jury resulted in a finding for the plaintiff that all the material allegations in her complaint are true, and that Harry E. Vordermark has in his hands \$290, and Lillian Ada Vordermark has \$85 in her hands from money paid by said John W. Vordermark to said Henry P. Vordermark, and by him to them, which was fraudulently done and paid by said parties to avoid the payment of said execution. And it was therefore ordered that Harry E. Vordermark and Lillian Ada Vordermark pay said money to the clerk of the trial court to abide the further order of said court.

And it was further ordered, adjudged and decreed by the court that said Tri-State Building and Loan Association do forthwith turn out to the sheriff the certificates of said stock for the purpose of sale thereof, etc., and that the officers of the Fort Wayne and New Haven Turnpike Company turn out and over to the sheriff of said county the certificates of said 18 $\frac{3}{4}$ shares of the capital stock of said company for the purposes of sale on said execution. It is further ordered that John W. Vordermark be enjoined from interfering with the plaintiff, or the sheriff, in levying such execution upon the interests of Henry P. Vordermark in one-half of the stock of goods, and the accounts and assets of said partnership, to satisfy said execution, and that all sales and transfers heretofore made between said parties, are declared fraudulent and void. And that the plaintiff have the right to levy said execution upon the said piano described in the answer of Lillian, Ada, Mary and Maud Vordermark, the sale and transfer of which is set aside

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as fraudulent and void, and that the plaintiff recover her costs in this action.

Here is a judgment rendered against all the defendants in the complaint. They were all co-parties to the judgment, and all entitled to appeal. *Hadley v. Hill*, 73 Ind. 442; *Gregory v. Smith*, 139 Ind. 48. The statute makes it the duty of any part of the co-parties to the judgment, who may desire to appeal from a judgment against them all, to make all such co-parties, parties to such appeal. R. S. 1894, section 647; R. S. 1881, section 635. And we have recently held, on a careful consideration of the statute and the adjudicated cases, that the statute means that they must all be made co-appellants. *Gregory v. Smith, supra*. We there held that "making a part of the co-parties against whom the judgment is rendered appellees on * * appeal * * clothed them with no more rights, and created no more liabilities against them, than if they had not been made parties at all." Of the defendants, against whom judgment was rendered in the circuit court, Henry P. Vordermark, the Fort Wayne and New Haven Turnpike Company and the Tri-State Building and Loan Association of Fort Wayne, Indiana, have been made appellees in this appeal, and not appellants. This, as we have seen, is the same as not making them parties to the appeal at all. The right conferred on them by the statute is to assail the judgment, and that they cannot do as appellees. *Gregory v. Smith, supra*.

The statute authorizes but one appeal from the same judgment, and before the right of appeal of any co-party can be barred by an appeal by a part of the co-parties to the judgment, he must be made a co-appellant in such appeal and served with notice thereof. The statute requires that all such co-parties to the judgment

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appealed from, shall be made co-appellants in an appeal by a part of such co-parties. Unless they appear and decline to join in such appeal, the statute provides that they shall be regarded as having joined. If they decline to join, their names may be struck out on motion, and they shall not take an appeal afterward. Therefore, if this court should proceed to hear the appeal without the presence of a part of the co-parties, against whom the judgment is rendered, or that which we have seen is the same thing, namely making them appellees instead of appellants, it must result in an ineffective adjudication, or the rights of the missing parties may be injuriously affected by the adjudication without their having been afforded an opportunity of being heard. It is a fundamental maxim in our jurisprudence that before any court can proceed to adjudicate upon any subject-matter, it must first acquire jurisdiction over all persons whose rights will be necessarily affected by such adjudication.. The rights of co-parties to a judgment will be necessarily affected by an appeal therefrom by a part of such co-parties, if in no other way, in barring the right in them afterwards to appeal, unless we construe the statute to allow more than one appeal. Such a construction is utterly untenable. *Elliotts App. Proceed.*, section 138, and authorities there cited. *Gregory v. Smith, supra.* See also *Gourley v. Embree*, 137 Ind. 82; *Wood v. Clites*, 140 Ind. 472; *Benbow v. Garrard*, 139 Ind. 571.

The appeal is, therefore, dismissed.

Filed January 9, 1895 ; petition for rehearing overruled September 26, 1895.

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No. 16,551.

SANDAGE ET AL. v. THE STUDABAKER BROTHERS MANUFACTURING COMPANY.

CONTRACT. — *In Violation of Statute.* — *Penalty.* — *Recovery.* — There can be no recovery as between the parties on a contract made in violation of a statute, the violation of which is prohibited by a penalty, although the statute does not pronounce the contract void or expressly prohibit the same.

SAME. — *Patent Right.* — *Sale of Letters Patent.* — *Rescission.* — *Letters Tendered Back.* — The tender back of letters patent by a buyer to the seller places the latter *in statu quo* so as to entitle the former to rescind the contract of sale on the ground that the letters were void for lack of novelty. (See note at end of opinion.)

EVIDENCE. — *Parol.* — *Inadmissible to Extend Effect of Written Contract.* — Parol evidence is inadmissible to extend the effect of a written contract to abrogate a prior agreement beyond the terms of such contract where it is complete and there is no apparent ambiguity therein that requires an explanation.

INJUNCTION. — *To Restrain Prosecution of Several Actions in Another State to Avoid Statute of This State.* — *All Parties Residents of This State.* — The right to an injunction to restrain the prosecution of several actions on a contract for the recovery of different installments, commenced in the court of another State for the purpose of avoiding a statute of the State of the residence of the parties, affecting the validity of the contract, is not defeated by the fact that complainant has other legal defenses available in the foreign jurisdiction.

SAME. — *To Restrain Prosecution of Several Actions in Foreign State.* — *All Parties Residents of This State.* — *Assignee.* — A party to a contract is entitled to an injunction restraining the prosecution of several actions for the recovery of different installments thereunder, commenced by the assignee of the other party in the court of a foreign State for the purpose of avoiding a statute of the State in which the contract was made and to be performed, and in which both the parties and such assignee reside.

From the St. Joseph Circuit Court.

A. L. Brick and C. Pickard, for appellants.

A. Anderson and L. Hubbard, for appellee.

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JORDAN, J.—The only questions arising and argued by appellants in this appeal are those based upon the alleged error of the court in overruling their separate motions for a new trial. Two principal propositions are presented for our consideration by appellants' learned counsel, namely: 1st. That the decision of the court is not sustained by sufficient evidence and is also contrary to law. 2nd. That the court erred in excluding certain evidence of the appellant Joshua Sandage. Appellee by this action sought to recover a certain sum of money paid by it to appellant Sandage, in the purchase of letters patent for an improvement in steel skeins, and to enjoin him, together with his co-appellant, the Sandage Steel Skein Company, from bringing or further prosecuting suits in the courts of Cook county, in the State of Illinois, upon certain contracts in writing mentioned in the complaint and for the cancellation of these contracts.

The complaint is in two paragraphs, and the following is substantially a correct summary of the facts as alleged in this pleading: Appellants, at and long before the commencement of this action, were residents and had their domiciles at the city of South Bend, Indiana. Appellee is a corporation also having its domicile at said city, long prior to the instituting of this action, and is there engaged in the business of manufacturing wagons and carriages. On July 19, 1882, appellant Sandage was the owner of certain letters patent for an improvement of steel axle skeins, issued to him by the government of the United States. On the date mentioned he sold and transferred these letters patent to the appellee by a contract in writing, executed by him and appellee. By this contract, the latter agreed to manufacture the patented skein, and to employ Sandage as a foreman in its factory for a period of two years, at a salary of \$1,500.00

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patent, and on January 27, 1890, served both of the appellants with notice to the effect that such an action had been commenced in that court, and that the validity of the patent would be assailed and in issue therein, and requested that said parties assist in said cause in defending the validity of the letters patent, claiming an estoppel against them by any judgment that might be rendered therein, against the validity of the patent. At the March term, 1890, of said United States Court, in said action, these letters by that court were adjudged and held to be invalid for want of novelty. Thereupon, on May 16, 1890, appellees executed and tendered to appellant, Joshua Sandage, a re-assignment of said letters, and a cancellation of said contracts, and requested him to repay to it the sum of \$20,000.00, all of which was refused by him. A like demand for cancellation of said contracts was made upon the Sandage Steel Skein Co., which was also refused. That in addition to the two suits already commenced by said Skein Company against appellee, said company was threatening to bring other actions on these contracts, in the courts of Illinois, and attach appellee's property, situated in that State. Sandage, at the time of the sale of the patent right to the appellee, had wholly failed and neglected to comply with the requirements of sections 6054 and 6055 of the Revised Statutes of Indiana, in relation to the sale of patent rights, and sold his said patent to appellee in violation of this statute. The supreme court of Illinois having held a statute of that State in relation to patents (being one similar to the statute cited above), void on the ground that it violated the federal constitution, it is averred that the appellants have resorted to the courts of Illinois in order to escape the laws of Indiana on that subject.

It is also averred that after this action was commenced

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and a temporary restraining order was granted against the appellants, that they made a sale of these contracts, in suit, to a resident of Chicago, Illinois. It is also shown that the tender of a re-assignment of this patent was continued by bringing the same into court for appellants' use. These are the conspicuous facts as presented by the record in this action. A trial upon the issues joined in the lower court, resulted in a judgment to the effect that appellants be perpetually enjoined from prosecuting or commencing any suit or suits for the purpose of enforcing the contracts in question, and that the same be cancelled and delivered up to the appellee, and that appellee recover of Joshua Sandage the sum of \$13,447.42 and costs.

One of the contentions of appellants is, that "the facts in this case, as alleged in the pleadings, and as shown by the proofs, do not make such a case as entitled the appellee to the equitable relief prayed in the petition and granted by the decree."

Upon the contrary, appellee contends that the evidence, fully authorized and justified the court in finding that the appellants commenced their suit in the State of Illinois for the purpose of evading the laws of Indiana, and thereby gaining an advantage over the appellees in the forum of a sister State.

We have examined the evidence in the record and are of the opinion that it establishes the facts alleged in the complaint, and sustains the finding and judgment of the court. It is insisted by counsel for the appellants that the alleged facts in the case at bar are a complete and adequate defense at law to the actions commenced upon the contracts in controversy in the courts of Illinois. Conceding this contention, however, can it be urged, consistent with reason, that this principle of equity can be invoked, to require appellee, under the facts, to go

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into the courts of another State, and there assail these contracts by pleading the facts in bar to the actions therein pending? This contention cannot be sustained upon any reasonable grounds. It is, however, a familiar rule that it is not sufficient that there is a remedy at law, but the same must be plain and adequate, and as practical and efficient to the ends of justice, and its prompt administration, as is the remedy in equity. It is manifest, we think, that had appellee been compelled to avail itself of the facts on which it based its cause of action in this case, as a cause of defense to the suits already commenced by the appellee, or to the others that they might institute upon the obligation in question, its remedy would not have been as adequate and efficient as the one invoked in this cause. Two actions had been commenced upon the alleged invalid contract, and another was threatened, in order to recover the installment of \$2,000.00 not yet matured. By waiting to contest, by way of defense, the right of appellants to enforce these payments of money under this contract, appellee might have been at least harassed by, and subjected to, repeated and vexatious litigation and much expense incident thereto, by appellants, or those to whom they might have assigned the contract in controversy. By appealing to a court of equity, the remedy was at once adequate and complete, and by one action all the relief to which appellee was entitled under the facts, could be awarded.

Counsel further contend that appellee was not entitled to have this contract rescinded until it had placed Sandage *in statu quo*. We recognize the full force of the rule that where a party desires to rescind a contract, he must do so *in toto*, and return the consideration which he received thereunder, and otherwise do that which will put him and the other party *in statu quo*. But

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what was necessary to be done, in view of the facts and circumstances in this case to put Sandage *in statu quo*? All that appellee received from him was an assignment of his right and title to the patent right in question. This right proved to be invalid and worthless, and appellee re-assigned the letters and tendered back the same to Sandage. This, evidently in our opinion, was all that appellant could, at the furthest, demand. Sandage had guaranteed the validity of these letters. Their validity was assailed in a court of competent jurisdiction; of this fact he was notified and requested to sustain them. They were adjudged by the court to be void for the reason herein stated. By this judgment appellant was bound. That money paid for worthless securities or rights or where the purchaser does not get that for which the money was paid may be recovered back, is a well settled proposition. Whar. Contracts, section 744; Benj. Sales, p. 540; *Burt v. Bowles*, 69 Ind. 1; *Jarboe v. Severin*, 85 Ind. 496. It was established on the trial that Sandage had failed to comply with the prerequisites of section 6054, R. S. 1881, section 8130, R. S. 1894, and section 6055, R. S. 1881, by neglecting to file copies of his letters with the clerk of the circuit court of St. Joseph county wherein the said patent was sold, and by not inserting in the written contract wherein appellee obligated itself to pay the purchase-price of the patent the words "given for a patent right." The penalty for disobeying this statute is a fine or imprisonment in jail. Section 6056, R. S. 1881, section 8132, R. S. 1894. That the non-compliance with this law rendered the contract, at least so far as appellee therein obligated itself to pay the purchase-price of this patent, invalid, as between the parties, is no longer a disputed question. *New v. Walker*, 108

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Ind. 365; *Brechbill v. Randall*, 102 Ind. 528; *Robertson v. Cooper*, 1 Ind. App. 78.

That there can be no recovery on a contract made in violation of a statute, as between the parties thereto, the violation of which is prohibited by a penalty, is a principle well recognized by the courts. This is true, although the statute does not, in terms, pronounce the contract void nor expressly prohibit the same. This doctrine is well supported by many English and American decisions. *Woods v. Armstrong*, 54 Ala. 150 (25 Am. Rep. 671), and the authorities collected in note to this case in 25 Am. Rep., p. 674; *Dillon v. Allen*, 46 Iowa, 299 (26 Am. Rep. 145); *Winchester Electric Light Co. v. Veal*, 41 N. E. Rep. 334. Counsel for appellant urge that this statute is in conflict with the federal constitution and therefore void. This question has been settled to the contrary in this State and is no longer an open question. *New v. Walker*, *supra.*; *Hankey v. Downey*, 116 Ind. 118 (1 L. R. A. 447); *Pape v. Wright*, *ib.* 502. It was in evidence that the supreme court of Illinois in the case of *Hollida v. Hunt*, 70 Ill. 109 (22 Am. Rep. 63), held a similar statute of that State relating to patent rights to be repugnant to, and inconsistent with the rights exercised by Congress in regard to such rights, and therefore void. In view of this latter fact, in connection with the other evidence in the case, we are of the opinion that it is shown that appellants, by bringing actions upon this contract in Illinois, instead of instituting the same in Indiana, where all the parties resided, did so for the purpose of obtaining an advantage over the appellee which they were not entitled to under the laws of the latter state.

As long as a citizen belongs to a State he owes it obedience, and as between States, the State in which he is domiciled, has jurisdiction over his person and his per-

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sonal relations to other citizens of the State. *Keyser v. Rice*, 47 Md. 203 (28 Am. Rep. 448). That a citizen of a State, under a showing of sufficient facts, can be enjoined from commencing or prosecuting a suit against his fellow citizen in the courts of another State, is an equitable rule, recognized and enforced by this court and many others. See *Wilson v. Joseph*, 107 Ind. 490; *Keyser v. Rice*, *supra*; *Dehon v. Foster*, 4 Allen, 545, 23 Cent. Law Journal, 268. This rule seems to be sustained by a clear weight of authority in this country. See 10 Am. and Eng. Ency. of Law, p. 909. It is declared in the decisions, that the court, in the exercise of this authority, does not proceed upon any claim of right to control or stay proceedings in the courts of another State or country, but upon the grounds that the person against whom the restraining order is issued, resides within the jurisdiction, and within the power of the restraining court. The court issuing the writ does not pretend to direct or control the one in the foreign State, but without regard to the subject-matter of the dispute, it considers the equities between the parties, and decrees *in personam* according to these equities and enforces obedience to its decree. We think that in the case at bar the facts sufficiently show a manifest equity in favor of appellee as to entitle it to the decree herein.

Appellants complain of the action of the court in not permitting Joshua Sandage to answer the following questions of appellee: "What, if anything was the consideration of the second or supplemental contract as to releasing you of your guaranty in the second contract?" The appellants' attorney explained to the court, on the court's request, as follows: "That that statement in the first contract and the second statement in the supplemental contract in reference to the having of suits and payments of costs, are ambiguous and not

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fully explained in the contract; that the contract was entirely abrogated, and that was a part of the consideration of the second contract; that the first contract was for royalties, and in consideration that Mr. Sandage gave up his right to the royalties more valuable to him than the second contract gave him, in consideration that if he gave that up, he should not be held responsible for the patent, and not be liable for any expense on the patent, explained, as stated in the contract; and that the defendants wished to show by this witness, in answer to this question, that the second contract was made upon the consideration and with the full understanding of the plaintiff, that they had investigated the said patent and told the defendant, Joshua Sandage, that they were willing to take their chances as to the patent being upheld in the courts, and that the said Joshua Sandage should not be held responsible for such patent if such patent was at any time held to be invalid."

By this question, appellants' counsel say that they desired and sought to show what the consideration of the supplemental contract was, and to explain what was meant to be repealed by it. It is obvious, we think, that the purpose of the evidence sought to be elicited by this question was to contradict the written obligation. The written contract in question is not incomplete and there is no apparent ambiguity therein that requires an explanation by parol evidence; nor was it in any way rendered necessary to show what part of the first agreement had been repealed and rendered of no effect by the second. This was easily disclosed by a comparison of the one with the other.

The evident purpose of the question, as it appears from the statements of counsel, was to show that the guarantee of appellant Sandage, made in the first contract as to the validity of his patent right, had been re-

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pealed by a parol agreement contemporaneous with the second written contract, and thereby contradict this latter instrument. The cases of *Kieth v. Kerr*, 17 Ind. 284, to the effect that when a written contract is incomplete, parol evidence that does not contradict it may be admitted to show the whole contract, and *Martindale v. Parsons*, 98 Ind. 174, where it is held that parol evidence may be received to aid in the construction of ambiguous contracts, lend no support to appellants' claim upon this question as herein presented. The court did not err in excluding this question. We have examined all the questions necessarily presented by this appeal, and are of the opinion that there is nothing appearing in the record that would entitle appellants to a reversal.

The judgment is therefore affirmed.

HOWARD, J. was absent and took no part in the decision of this cause.

Filed September 27, 1895.

NOTE. — The conflicting authorities on the power of a State to restrict and regulate the sale or enjoyment of patent rights are found in a note to *Commonwealth v. Petty*, (Ky.) 29 L. R. A. 786.

No. 17,466.

CULP ET AL. v. CULP ET AL.

WILL. — *Action to Set Aside.* — *Failure to Make Provision for Granddaughter.* — *Instruction.* — *Presumption.* — An instruction in an action to set aside a will upon the ground, *inter alia*, that the testator did not mention a granddaughter, or make any provision for her, either directly or as in her mother's right, that the law presumes the testator overlooked or forgot her, and that she will take her share under the law, whether the will is upheld or not, is a prejudicial error, as there is no such presumption of law upon the facts, and its assumption deprives the omission of its significance upon the issue.

Culp et al. v. Culp et al.

From the Elkhart Circuit Court.

H. C. Dodge, for appellants.

Wilson & Davis, for appellees.

HACKNEY, J.—Elizabeth Weaver, a daughter of Anthony Culp, died February 18, 1892, and her only surviving child was the appellant Rosa Weaver. Thereafter, on May 23, 1892, said Anthony Culp executed his last will, by which he directed the payment of his debts and the erection of a monument from his personal estate, and any residue thereof, he directed, should be equally divided among his children. His one hundred and sixty acres of land he devised, the south half to his wife, during her natural life, and the north half was to be rented and the proceeds applied to the taxes and repairs on the whole, and the residue paid in equal parts to his children. It was further provided that upon the death of the wife, the whole of said lands should be sold and the proceeds equally divided “among all of my children, share and share alike.” At the date of the execution of said will the said Anthony Culp had ten living children and the one grandchild, said Rosa Weaver, all of whom were living at the date of his death, to-wit: August 20, 1892. After the death of said Anthony Culp, the appellants brought this action to set aside said will, alleging unsoundness of mind and undue influence. One of the facts, upon which the appellants relied, was that though the testator knew of the death of his daughter, Elizabeth, and knew and was on friendly terms with the child, Rosa, he did not mention her name in said will, or make provision therein for her, either directly or as in her mother’s right.

At the trial the court gave, among other instructions, the following: “It is undisputed that the decedent left

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ten living children and one grand daughter, the plaintiff, Rosa Weaver, who is a child of his deceased daughter, Elizabeth. The will uses the term children, which does not include Rosa, as she is a grandchild, and the presumption is that he overlooked or forgot her, and, if she was so overlooked or forgotten, while she would not take under the will, she would take her one-eleventh under the law, just the same as if there were no will, and in that case Rosa will get her share all the same, no matter which way the case is decided."

The question of the correctness of this charge is presented by the record. The appellees insist that the instruction was too favorable to the appellants, in that, by the law, Rosa was included under the designation of "children," and that no presumption that she was forgotten, or was overlooked, was authorized. The appellants, on the other hand, insist that the instruction was harmful to them, in that it advised the jury that the law, notwithstanding the will otherwise disposed of the entire estate, provided one-eleventh thereof for Rosa, and that the verdict could not defeat her in that provision. There can be no doubt that the word "children," having been employed here without manifesting an intent that it should include grandchildren, would not include the granddaughter. *West v. Rassman*, 135 Ind. 278; *Pugh v. Pugh*, 105 Ind. 552; *Cummings v. Plummer*, 94 Ind. 403.

That the law made provision for the granddaughter, notwithstanding the disposition of the entire estate to the ten children, was, in our judgment, an error, and was such as might have prejudiced the rights of the appellants. Memory, that has sufficient strength to call to mind the objects of one's bounty, and sufficient grasp to retain them until the will is executed, is always of supreme importance when inquiring as to test-

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amentary capacity. That a testator failed to provide for one who was the natural object of his bounty, when the circumstances do not appear to indicate a previous just provision, by way of gifts or advancement, or that there was such hostility between them as to render probable the desire to deprive such an one of a share in his bounty, is a circumstance to be considered by the jury in determining whether the omission arose from the lack of memory to recall or to retain in mind those for whom, naturally, he would make provision. This the appellees' learned counsel concede. They say: "It is always a question that may be considered by the jury in determining one of the two commonly alleged causes to set aside a will, namely, 'unsoundness of mind' and 'undue influence,' whether the testator had forgotten so much, and his memory had failed to such a degree, that he didn't know what he was about when he wrote his will; and to prove this, it is always competent to show that the name or names of one or more of the children were omitted by the testator in his will." This conclusion, it seems to us, demonstrates the error of the court's charge, for why should it be a pertinent fact that the testator omitted provision for a child when, in the absence of provision by the will, the law made just that provision which he would naturally make? The jury, in weighing the fact that the testator omitted provision for a child, or grandchild, and considering that when the will was drawn, the law provided an ample and just share in the estate for that child, could, with reason, decide that it was no evidence of an unsound mind that a testator omitted to make provision where the law had already made just the provision he would naturally have made.

This State, unlike many other States, has no statute pro-

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viding for children, whose ancestors have, by their wills, made no provision for them. It is a privilege of an ancestor to make such inequality of division among his children as he may desire, and if he so desires it, he may leave a child without an interest in his estate. The child, unlike the wife, has no such legal interest in the father's estate, that it can be enforced, regardless of testamentary provision. When, in this case, the testator gave his entire estate to his ten children, there was no remedy by which the granddaughter could reach the one-eleventh thereof, as instructed by the court. It would have required a statute, to become a part of the will and bind the testator in its execution, to take from each of the ten children a fraction of his share and give it to the omitted child. However just such a statute might appear, its absence cannot be supplied by the courts. And, as we have already said, if such were the law, there would be but little room for the rule that the failure to provide for a child is a circumstance tending to establish unsoundness of mind.

The failure gets its strength as a circumstance from the improbability that, without cause, a father will disinherit his child, that he would be so unjust with those to whom his bounty is equally due, as to enrich some and leave others without a share. But if the child is not disinherited, and if that injustice is not done, but if the law, which all are presumed to know, has done what the father should have done, that very fact may have influenced the father to omit provision by will, excepting where he desired to make special provision, and to permit the law to control where he does not provide. Instead of becoming a circumstance betraying a weak memory, it might be regarded as a most rational view.

The instruction was erroneous, and we cannot say that it was harmless.

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The judgment of the circuit court is reversed, with instructions to sustain the appellants' motion for a new trial.

Filed September 27, 1895.

No. 17,418.

TREAGER v. JACKSON COAL AND MINING CO.

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151	498

142	164
169	290

EVIDENCE.—*Notice.*—*Admissions.*—*Mining Boss.*—*Personal Injury of Servant.*—*Dangerous Condition of Mine.*—Upon the issue as to knowledge, by a mining company, of the defect in the roof of the mine, which caused an injury to an employe, evidence that after the accident the mining boss admitted that he had been notified of the defect, is inadmissible in the absence of evidence, offered or given, that at the time of the admission the latter was engaged in the discharge of any duty owing to the company, or that he was transacting any business for it whatever.

APPELLATE PROCEDURE.—*Erroneous Instruction.*—*Instructions Not All in Record.*—*Reversal of Judgment.*—The supreme court will not reverse a judgment for instructions not so palpably erroneous that no supposable instruction would have made them correct, where the instructions given are not all included in the record.

From the Clay Circuit Court.

R. Fisher and J. A. McNutt, for appellant.

G. A. Knight, for appellee.

MCCABE, C. J.—The appellant sued the appellee for damages laid in his complaint at \$5,000.00, resulting from the alleged negligence of the appellee.

The issues formed upon the complaint were tried by a jury, resulting in a verdict and judgment for the defendant, over appellant's motion for a new trial. The action of the circuit court in overruling that motion is assigned for error.

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The first and second reasons assigned therefor in the motion for a new trial are waived by the appellant, expressly as to the first, and impliedly as to the second, by failure to discuss it in his brief. The third reason relates to the exclusion of certain offered evidence.

The injury complained of was received by the appellant while engaged in his duties as an employe of appellee in its coal mine, by a stone falling on him from the roof of the entrance thereto. The negligence charged against the appellee was permitting said roof to remain in an unsafe and dangerous condition, under which appellant had to pass in going to and returning from his work in appellee's coal mine.

The appellant asked of his witness, one Nicoson, while on the stand, the following question, to-wit: "Was there any conversation there between you and Mr. Cox, or any other parties present?" Appellee's counsel objected to the question on the ground that no conversation of Mr. Cox or others at that time could affect the defendant. Thereupon, "the plaintiff offered to prove by this witness, that Cox, then and there, in a conversation had by and between said Cox and the witness, admitted that he had been notified by the witness of the dangerous condition of the roof as aforesaid, and further offered to follow up this testimony, and prove by other testimony, that the place so pointed out was the identical place where plaintiff was injured," and the court sustained the objection.

There was no showing, or offer to show, that either Cox or Nicoson, or any body else engaged in the conversation proposed to be proven, bore any relation whatever to the appellee, so as to make such conversation binding on, or admissible against, the appellee. As offered, the conversation had nothing to rescue it from the objection that it was mere hearsay evidence. It is

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true it appeared in evidence afterwards, that Cox was the appellee's mine boss; his duties being to open out the mines, locate the roads, lay off the entries, and have them made safe as a traveling way for the men and mules, and have it sufficiently and properly aired. But there was no evidence offered or given that at the time the proposed conversation and admission of Cox was had or made, he was engaged in any of these duties, or that he was engaged in the discharge of any duty he owed to appellee, or that he was transacting any business for the appellee whatever. Declarations of an agent made while not engaged in transacting the business of the principal, are not admissible against the principal. *Hynds v. Hays*, 25 Ind. 31; *Bennett v. Holmes*, 32 Ind. 108; *Union Cent. Life Ins. Co. v. Thomas*, 46 Ind. 44; *La Rose v. Logansport Nat'l Bank*, 102 Ind. 332; *Ohio, etc., R. W. Co. v. Stein*, 133 Ind. 243 (19 L. R. A. 733). There was no error in sustaining the objection.

The fourth and last reason assigned in the motion for a new trial is the giving of certain instructions asked by the defendant. These instructions do not purport to be all the instructions given in the cause, nor does the record show that they are. Out of the whole series of Nos. 3, 4, 5, 6, 7, 8, 10 and 12 given, only the 3d, 5th, 6th, 7th and 8th, are objected to in argument by the appellant. As was said in *Cooper v. State*, 120 Ind. 377, page 381, that "While it appears that the court gave certain instructions, set out in a bill of exceptions, it does not affirmatively appear either by implication or by a direct statement to that effect, that the instructions set out in the bill were all that were given. In the absence of such affirmative statement, or something from which the fact could be implied, we could not reverse a judgment unless an instruction com-

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plained of was so radically wrong as to be incurable." To the same effect are *Puett v. Beard*, 86 Ind. 104; *Garrett v. State*, 109 Ind. 527; *Grubb v. State*, 117 Ind. 277.

We have carefully examined the instructions complained of, and find many of them correct in the abstract and as applied to the case made by the evidence, and the others not so radically wrong as to be incurable by other proper instructions. As was said in *Marshall v. Lewark*, 117 Ind. 377, at page 379, "When, therefore, one or more instructions appear in the record, which, if properly explained and adapted to the case by other instructions, would or might be correct, we will presume that the necessary explanations or qualifications were made by the court, and unless the instructions given were so palpably erroneous as that no supposable instruction would have made them correct, a reversal will not follow, even if some inaccuracies appear in the instructions upon which error is predicated." To the same effect are *Clore v. McIntire, Admr.*, 120 Ind. 262; *Grubb v. State, supra*; *Cooper v. State, supra*; *Puett v. Beard, supra*; *Cline v. Lindsey*, 110 Ind. 337. There was, therefore, no available error in giving the instructions mentioned, and hence no error in overruling the motion for a new trial.

The judgment is affirmed.

Filed May 28, 1895; petition for rehearing overruled September 27, 1895.

State, *ex rel.* Duensing, *v.* Roby *et al.*

No. 17,639.

STATE OF INDIANA, EX REL. DUENSING, *v.* ROBY ET AL.

CONSTITUTIONAL LAW.—*Injunction.—Bond.—Due Process of Law.—*

Allowing an injunction without a bond to prevent the use of property in violation of a statute does not deprive the owner of his property without due process of law.

SAME.—*State Interfering with Use of Private Property.—Police Power.—*The right of the State to interfere with the use of private property by its owner belongs to the police power of the State.

SAME.—*Police Power.—Horse Racing.—*A statute prohibiting horse races during the winter months, or public race meetings on any track more than three times in any year, or more than fifteen days at a time, or more than twice in sixty days, or with less than thirty days between meetings, is a legitimate exercise of the police power of the State.

CRIMINAL LAW.—*Jeopardy.—Civil Remedy in Addition to Criminal.—Injunction.—*A suit for an injunction against the violation of a statute and punishment for contempt of such an injunction, in addition to a criminal prosecution for the illegal act, do not violate the constitutional provision against putting a person twice in jeopardy for the same offense.

HORSE RACING.—*Prohibition Of.—Statute Construed.—Change of Persons, Companies, Associations, or Corporations.—*A change of the persons, companies, associations, or corporations who hold race meetings on the same track, does not relieve from or avoid the prohibition of the act of 1895, against holding race meetings more than three times in a year, or twice in sixty days, or with less than thirty days intervening.

STATUTORY CONSTRUCTION.—*Statute Providing Both Civil and Criminal Remedies for Its Violation.—Constitutional Law.—*A provision for civil remedies and procedure, as well as criminal prosecutions for violation of other provisions of the same statute, does not make it invalid as including more than one subject of legislation.

SAME.—*Violating Statute.—Remedies Criminal and Civil.—Constitution.—*The constitutional provision against local or special laws regulating practice in courts of justice is not violated by including in a statute a provision for remedies both civil and criminal in case of its violation.

SAME.—*Construction.—History of the Times.—*A court will examine the history of the times in construing a statute, so as to relieve from the mischief and accomplish the purpose of the act.

SAME.—*Construction.—Horse Racing.—Extending Provisions.—Title of Act.—*The terms "race" and "race meeting," as used in the

142	168
142	700
142	168
145	251
145	451
147	468

142	168
151	145
152	8
152	16

142	168
156	699

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161	620

142	168
165	195

142	168
169	217

142	168
171	376
171	548

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act of 1895, section 2, without expressly limiting them to horse racing, will not be construed as extending the provisions of the act to embrace a subject not expressed in the title, which is "An act regulating horse racing."

SAME.—*Penal Statute.—Title of Act.—Extension of Meaning.*—The doctrine of strict construction of a penal statute does not apply to expand or extend general words used in the body of a statute beyond the scope of the title, so as to make the act invalid.

From the Lake Circuit Court.

W. A. Ketcham, Attorney General, *J. Kopelke*, *T. H. Heard*, *J. G. Ibach*, *W. H. H. Miller*, *F. Winter* and *J. B. Elam*, for appellant.

J. W. Youche, *W. Olds*, *C. F. Griffin* and *J. B. Peterson*, for appellees.

MCCABE, J.—The Governor of this State in his biennial message to the Legislature of the State in January, 1895, called attention to certain facts, and made certain recommendations for the consideration of that body as follows :

WINTER RACING.

"Near the city of Hammond there has been located what is known as the 'Roby Fair Association.' It is not incorporated under the laws of this State, nor, so far as I can ascertain, of any State; and what is the legal nature of the association is sedulously concealed. What its actual nature is, its purposes and character are without any concealment. It is simply an immense gambling concern, with a racing attachment to give it the appearance of respectability, and draws within our borders the lawless and disreputable elements of Chicago, for a purpose that is not permitted, nor could be tolerated within that city's limits. Its every influence is demoralizing, encouraging vice, propagating crime, and thus brings our State into disrepute. Its transactions have been open and notorious, but the authorities of Lake county seem to be either indisposed or powerless to pre-

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vent them. I have been earnestly seeking some means, warranted by law, by which this disgrace to our State could be prevented, and although having the able advice, earnest assistance, and active co-operation of Attorney-General Ketcham, have failed to find the way * * *.

“To contend that racing of horses can be humanely or interestingly conducted in this climate during the winter months, is a rank delusion and fraud. It is but a cloak to deceive and afford opportunity to conduct gambling on a gigantic scale and the assembling of disreputable crowds.

* * * * *

“I, therefore, in the name of the people, insist that you shall take action upon this subject, and recommend that you make it unlawful for any association within the State to hold such meetings between the first day of November and the first day of April, that no race meetings shall be held within the State, except by associations duly incorporated under the laws of this State.”

Pursuant to this information and recommendation, that Legislature passed the following act: (Acts 1895, p. 92.)

“An act regulating horse racing, defining the meaning of certain terms, prohibiting horse racing at certain seasons, prescribing a penalty for a violation of the provisions of this act, prescribing rules of procedure, giving certain civil remedies, authorizing the institution of civil suits, and declaring an emergency.

“Section 1. Be it enacted by the General Assembly of the State of Indiana, that it shall be unlawful for any person, corporation, company or association to cause, permit, or allow any horse, mare, filly, gelding, colt or mule to race on any track or course wholly or partly within this State at any time between the fifteenth day of November and the fifteenth day of April in any year

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for a purse or a prize in the presence of fifty persons or more, or in cases where advertisements or notices of such race or races are published or given notifying the public that such a race will take place. Any person, corporation, company or association aiding or abetting in such race by taking part in advertising therefor, or by furnishing any animal to participate in such race, or by acting as driver therein, or by allowing or suffering the use of a track, course, or other place owned, managed or controlled by him or it, or by aiding in any way in conducting such race, shall be deemed guilty of a misdemeanor and shall be fined not less than one hundred dollars nor more than five hundred dollars, to which may be added imprisonment in the county jail for a period not exceeding six months.

“Sec. 2. It shall be unlawful for any person, corporation, company or association to hold or advertise for a race meeting oftener than three times in any year, and no race meeting shall be held longer than fifteen days. It shall be unlawful to hold any race meeting oftener than twice in any period of sixty days, and it shall also be unlawful to hold any race meeting until after the full period of thirty days has elapsed after meeting has been held. Any person violating the provisions of this section, or aiding or abetting in the violation thereof shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, to which may be added imprisonment in the county jail for a period not exceeding sixty days.

“Sec. 3. The term ‘race,’ as herein used, shall be taken to mean any and all trials of speed of animals of the horse kind, and any and all matches where such animals are suffered to run, gallop, pace or trot for money or prizes, or upon public exhibition, on any track or course.

“The term ‘race meeting,’ as used in this act, shall be

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taken to mean and include all assemblies of persons, or all meetings of persons, who come together, or are notified to come together, for the purpose of witnessing any trial of speed, whether running, galloping, pacing or trotting.

“The terms ‘track’ or ‘course’ shall be deemed to mean and include all places prepared, used, kept or maintained for the purpose of conducting races, or of giving public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money or reward is contested for by running, galloping, trotting or pacing.

“Sec. 4. In case of a violation of any of the provisions hereof by any person, whether he was at the time acting with the sanction of the owner, lessee or manager of such track or not, it shall be competent for any citizen of the State to file an information, in the name of the State, on his relation, in the Circuit Court of the county where such track is situate, alleging that any of the provisions hereof, and that the person or persons against whom such information is filed threaten, propose or give out that he or they will do any act hereby prohibited, has been violated, whereupon it shall be the duty of such Court, or the Judge thereof in vacation, to issue a temporary restraining order restraining all persons from in any way violating or assisting in the violation of this act. As soon thereafter as possible the Court or Judge shall direct notice to be given to all defendants, so far as they can be reached by notice, that at a certain time, to be fixed by the Court or Judge, they may appear and show cause, if any they have, why such order shall not continue until the final hearing. Such notice may be served upon any agent, employe or servant of the defendant or defendants, and shall be as effective as if served upon the defendant or defendants personally, or

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if the defendants are not residents of this State or are unknown or cannot be found, notice may be given by publication as hereinafter provided.

“Sec. 5. All persons who appear to have any interest in such race track property upon the records of the county may be made defendants to such suit, and such persons, as well as all others concerned (the latter of whom need not be mentioned by name) may be notified of the pendency of such proceedings for at least two weeks by publication in some weekly newspaper of the county, of general circulation therein. At the expiration of such time any person having a legal interest in the result of such suit may, upon petition, be admitted as an additional party defendant. Any person having an interest in such property, whether made a party or not, shall be bound by the judgment.

“Sec. 6. Changes of venue may be granted from the county to either party, as in other cases, and the relator shall not be liable for any costs. The suit shall be prosecuted either by the prosecuting attorney or, at the request of the Governor, by the Attorney-General or by an attorney designated by the Governor.

“Sec. 7. An emergency is declared to exist for the immediate taking effect of the act, and it is therefore declared to be in effect from and after its passage.”

On May 8, 1895, this suit was begun by the appellant under the provisions of the above statute, by filing a complaint or information, in a single paragraph, against the appellees, in the Lake Circuit Court, in the name of the State, on the relation of Julius Duensing, a citizen of the State of Indiana, which was duly verified. A temporary injunction was granted until the final hearing.

On May 15, 1895, on the motion of appellee Roby, the temporary injunction was dissolved.

On May 24, 1895, being the 29th judicial day of the

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April term of said circuit court, the appellant filed a verified amended information in two paragraphs. And afterwards, at the same term, filed a supplemental information on leave of court, which was also duly verified.

. Afterwards the defendants, Edward Roby, Edward A. Shedd, Charles B. Shedd, The Roby Fair Association, The Roby Breeders' Association, John Condon, Rod Wells and John Kelsey, appeared and separately demurred to the information, and to each paragraph thereof, and to the supplemental information for want of sufficient facts, which demurrer the court sustained, and the plaintiff refusing to further plead, the appellees took judgment upon the demurrer that the plaintiff take nothing by this suit.

The substance of the first paragraph of the amended information is that the relator informs the court that he is a citizen of the State of Indiana, prosecuting this action, at the request of the Governor of the State, by the attorney-general; and that the defendants Roby and the Shedd are the owners, as appears of record in the recorder's office of said county of certain real estate, describing it, situated in said county; that the other defendants, to-wit: James A. Webb, The Indiana Racing Association, The Roby Breeders' Association, The Roby Fair Association, and The Hammond Fair Association, John Condon, Rodman Wells, John Kelsey, ——— Dwyer, whose christian name is to the plaintiff unknown, with others whose names are unknown to the relator, have either jointly or separately some interest in, or contracts in relation to, said real estate as to its use and occupancy, but which interest does not appear of record in the recorder's office of the county or elsewhere, and hence plaintiff is unable to set it forth but makes them defendants to answer as to their inter-

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est; that The Indiana Racing Association, The Roby Breeders' Association, The Roby Fair Association, and The Hammond Fair Association are not, nor is either of them incorporated under the laws of the State of Indiana; that said association defendants and each of them are partnerships or some other form of association of the particulars or character of which the relator is not advised; that said defendants, other than Roby and Shedd, are each and all interested as partners or otherwise in said several associations or partnerships for the purpose of carrying on racing upon the premises herein described, and are organized and doing business under said several and different names for the purpose of evading the statutes of the State of Indiana in that behalf enacted, as hereinafter more fully averred and set forth; that there is situated upon the real estate a race track or course, prepared, used, kept, and maintained by the defendants for the purpose of conducting races and holding race meetings to give public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money and rewards are contested for by running, galloping, trotting or pacing of such animals, and for the purpose of assemblies and meetings who come together for the purpose of witnessing such trials of speed, which place, track, and course are commonly known and designated as the "Roby Race Track;" that on April 15, 1895, previous notice thereof having been given by publication in newspapers, a certain race meeting was held to continue according to such notice, for a period of fifteen days from, after, and including said April 15, upon said grounds, and continuously from said 15th day of April, for a period of fifteen days, excluding Sundays, said race meeting was held, whereat were given races upon each and every day, except Sundays, up to and including the second day of May, 1895,

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such race meeting being held by the defendants other than the defendants Roby and Shedd, under the name and designation of "The Roby Fair Association," each of said defendants, other than Roby and Shedd, participating together with other persons to the plaintiff unknown in the holding of said race meeting, and the defendants Roby and Shedd having full knowledge at the time such race meeting was being held and such races were being run upon the real estate hereinbefore described, of which they were the owners as aforesaid; that thereupon, at and prior to the third day of May, 1895, the defendants, other than Roby and Shedd, did, with their knowledge, consent, connivance, assistance and co-operation and with that of others, cause notice to be published that commencing with May 3, 1895, and thenceforward continuously for a period of fifteen days, "The Roby Breeders" Association would hold a race meeting, and would upon each day for a period of fifteen days from after and including said third day of May, but excluding Sundays, give races, trials and exhibitions of speed and matches wherein animals of the horse kind would be permitted to run, gallop, pace and trot for money and other prizes upon public exhibition; and upon said May 3, 1895, and at and prior to the filing of the original information, said defendants, other than Roby and Shedd, did, as advertised, begin a race meeting before the period of thirty days had elapsed from and after the first race meeting as hereinbefore set forth, and said last named race meeting, when taken in connection with the first, constitutes a holding of a race meeting oftener than twice in a period of sixty days, contrary to and in violation of the statute in such cases made and provided, which last named race meeting was begun and continued from day to day until the same was enjoined and restrained by the temporary injunc-

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tion already mentioned, with the knowledge, consent, acquiescence, and connivance of the defendant Roby and the defendant Shedd, by the same parties, to-wit: the defendants herein and others unknown to the plaintiff, under the name of The Roby Breeders' Association, who, under the name of The Roby Fair Association, held said first named race meeting as hereinbefore averred; that the above named defendants, other than Roby and Shedd, with the knowledge, consent, acquiescence, and connivance of the defendant Roby and the defendant Shedd, with other persons concerned, connected and interested with them, whose names are unknown to the relator and to the plaintiff, threaten, propose and give out that they will hold such race meetings oftener than three times in any one year; that they will hold such race meetings longer than fifteen days at a time; that they will hold and cause such race meetings to be held, but under different names, oftener than twice in any period of sixty days; that they will not allow thirty days to elapse after any such race meeting has been held by them until they will hold another on said premises; that as soon as one race meeting of fifteen days duration has been held by them, they will hold other meetings and continue such meetings, but for the purpose of evading the law, while seeming to comply therewith, they will hold such race meetings, while in their interest and by them or by some of them, under different names, and that the owners of said race-track property concur and unite with the other defendants in their said threats and propositions to continue such race meetings continuously; that each of the race meetings heretofore held and that are proposed to be held by said defendants, are all in the interest of the owners of said real estate and race-track property, and of the other defendants hereto en-

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gaged in the business of racing and holding race meetings; that the defendants herein and the parties whose names are unknown to the plaintiff, are members of the said several associations herein named, and that said associations are in truth and in fact one and the same association maintained and controlled by the same parties and for the same purposes; that since the filing of the original complaint herein, the defendant, the Hammond Fair Association, has been organized for the purpose of advertising and holding a race meeting upon said real estate, and therefore it is a proper party defendant herein, and plaintiff asks that it be made a party defendant and to amend the complaint in that respect. That the defendant Edward A. Shedd was not originally made a party defendant hereto, by inadvertence and oversight, but that he has an interest in the subject-matter of this action by reason of his interest in said real estate, and plaintiff, therefore, asks leave to make him a party defendant. Prayer for a temporary restraining order, and on the final hearing for a perpetual injunction.

The second paragraph only differs from the first in substance, in that it alleges that said defendants Roby and Shedd had leased said premises, said track and course, to the other defendants, and such incidental changes as that change would require.

The supplemental information only differs in substance from the first paragraph, in that it states dates of race meetings differently and makes a new party defendant not before brought in, Louis E. Hohman. The demurrer to these several pleadings presents substantially the same question, and has been so treated in the main by the counsel.

The action of the trial court in sustaining the demur-

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rer is defended by appellees' learned counsel, on the ground, mainly, that the statute is unconstitutional.

Their first contention, however, is that the first section is void because they say it is insensible.

It is assumed by the appellant's counsel that it was intended to prohibit winter racing, that is, horse racing between the 15th day of November and the 15th day of April. But appellees' counsel contend that it does not mean that at all, because the inhibition is "at any time between the 15th day of November and the 15th day of April in any year."

They contend that the period of time there designated must be that period intervening between April 15th and November 15th in the same year, thus making the statute prohibit summer racing instead of winter racing. This, they say, contradicts that part of the clause which makes the forbidden period begin the next day after the 15th day of November, and end with the day before the 15th day of April, which plainly requires the time prohibited to run forward and not backwards.

But it is not the first section with a violation of which the appellees were charged in the information, nor against a threatened violation of which the injunction was sought by the appellant. It will be time enough to construe that section when the question arises.

It is for an alleged violation of section two of the act, that this action was brought, such action being authorized by sections four and five. But it is contended that the second section is unconstitutional because not covered by the title of the act, and that the whole act is in violation of the constitution of the State, in that it embraces two distinct subjects of legislation, namely, the creation of misdemeanors, prescribing punishment therefor, and creating certain civil remedies authorizing the institution of civil suits and prescribing rules of procedure therein.

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In *Robinson v. Schenck*, 102 Ind. 307, at page 319, it was said: "The power to declare a statute void on the ground that it is in conflict with the Constitution is peculiar to the American courts, and the doctrine established by our cases is not found in other systems of jurisprudence. The early cases * * show that the courts at first asserted this doctrine with much hesitation, and there are still some writers who deny the existence of the power, but it is now firmly fixed in our law (citing authority). * * * The power is one of the highest possessed by any judicial tribunal in the world, and is, as all the authorities agree, to be exercised with the utmost care and only in the clearest cases. If there is a doubt in the mind of the court as to the validity of the statute, it must be resolved in favor of the Legislature." There are many good reasons in support of the principles thus announced. Under our form of government there never ought to have been any doubt of the right and the duty of courts in a proper case to declare a statute void because of its conflict with the constitution. This right and duty does not grow out of the condition that statutes and acts of the legislative department within its domain are not absolutely binding upon the judiciary. But it grows out of the fact that the constitution is the supreme law of the land. Hence, when it is found that a statute contravenes its mandates the duty to support the constitution, emphasized by the solemn sanctions of an oath, can only be discharged by overthrowing the statute.

On the other hand acts of the Legislature come to us as the expression of the will of the sovereign people clothed with the majesty of law, imposing upon the judiciary the solemn duty of upholding the same, unless found to clearly conflict with the Constitution, State or Federal. There is the best of reasons why doubts should

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be solved in favor of the validity of the act of the Legislature. In case of doubt there might be a mistake in declaring the act unconstitutional by the court. To declare an act void for unconstitutionality in a doubtful case through a mistake of a court of last resort would have the effect not only of paralyzing one of the co-ordinate departments of the State government, but it would be an usurpation of power by the court, a power withheld from it by the people in the constitution.

The dangerous consequences liable to result from a possible mistake in declaring an act of the Legislature void for unconstitutionality, are sufficient alone to inspire the judiciary with the greatest caution in that respect, and furnish ample justification for the rule that no statute will be declared unconstitutional unless its conflict with the constitution is beyond reasonable doubt. Guided by these salutary rules, we proceed to examine the constitutional question.

It is contended that the second section is void because not within the title of the act. As we have seen, the title of the act is limited to regulating horse racing and prohibiting the same at certain seasons of the year. The contention is that the second section only prohibits "race meetings" oftener than three times in any year, and the holding of race meetings longer than fifteen days, or oftener than twice in any period of sixty days, and the period between such meetings is required to be not less than thirty days, without any requirement that the race meetings thus limited and restricted were meetings for horse racing. It is contended that as the term "horse" is not once mentioned in the section, and as that part of section 3, which undertakes to define the terms "race" and "race meeting," as used in the act, also fails to mention the term "horse," both sections may include other kinds of races or trials of speed,

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such as races between cattle, men, reindeer, dogs, or other beings or animals that can run, gallop, pace or trot, and therefore it embraces a subject not expressed in the title.

It is true the title is so framed as to limit the act to racing of horses, and it is true also that section 2 does not use the term "horse" or "horse racing," and it is also true that the defining part of section 3 as to the meaning of the terms "race" and "race meeting" does not use the term "horse" or "horse racing," but the concluding clause of section 3 does use the language, "giving public exhibitions of trials of speed or matches between animals of the horse kind by * * running, galloping, trotting or pacing." This gives an indication of the particular kind of racing the Legislature had in mind in both sections. In construing an act the court ought to examine the history of the times so as to relieve from the mischief and accomplish the purpose of the act. Maxwell Interpretation of Statutes, pp. 133, 318, 333, 345; Potter & Dwarris, pp. 240, 247, 262; Suth. Stat. Con., sections 234, 235, 241, 246, 349, 354, 356. In *Stout v. Board, etc.*, 107 Ind., 343, at p. 347, it was said: "The legislative intention, as collected from an examination of the whole, as well as the separate parts, of a statute, will prevail over the literal import of particular terms, and will control the strict letter of the statute where an adherence to such strict letter would lead to injustice, to absurdity, or contradictory provisions." *U. S. Savings, etc, Co. v. Harris*, 142 Ind. 226, and authorities there cited.

In view of the current historical facts to which the legislative attention was called by the Governor's message, and in view of the whole act including its title, it would be difficult to say that the terms "race" and "race meetings" used in the second section did not re-

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fer to and mean only horse races and meetings for having and carrying on horse races. Especially is this true in view of the fact that the public morals and good order of society were never threatened by cow races or cattle races, dog races, or any kind of races other than horse races.

An eminent author states the rule thus: "The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition; construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of any part. This survey and comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord, if practicable, and thus if possible, give a sensible and intelligible effect to each in furtherance of the general design." *Suth. Stat. Con.*, section 239. The same author says: "If the meaning is doubtful, the title if expressive may have the effect to resolve the doubts by extension of the purview, or by restraining it," *id.* section 210. "But the title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent, in cases of doubt its help cannot be rejected for being extrinsic and extra legislative. The language of an act should be construed in view of its title and its lawful purposes; broad language should be confined to lawful objects," *id.* section 211. To the same effect is *Garrigus v. Board, etc.*, 39 Ind. 66.

Guided by these rules, we would be justified in holding that no other racing than horse racing, and no other

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race meetings were intended in the act than those at which horses were to be run.

At least there must be a reasonable doubt whether those terms as used in section 2 did not have reference solely to horse races and meetings for the purpose of carrying on horse races and horse racing. That doubt should be resolved in favor of that construction that would bring the section within the title and thus uphold its constitutionality. Where the constitutionality of a statute or any of its provisions is under consideration, it has been the uniform rule of this court to so construe and interpret it, if possible, as to sustain and not defeat the law; and it is not enough that the constitutionality of the legislation may seem to be doubtful, for in such case the benefit of the doubt must be given in favor of the constitutionality of the legislation. *Warren v. Britton*, 84 Ind. 14; *Campbell v. Dwiggin*s, 83 Ind. 473; *Hays v. Tippy*, 91 Ind. 102.

But the learned counsel, for the purpose of showing that the section is not covered by the title, invoke the aid of the rule of strict construction. They contend that the section is highly penal and must be strictly construed; and in support thereof quote the following rules: "Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted. * * * (Potter & Dwarrior, 245.) * * * The law of England does not allow of constructive offenses. No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and the letter of the statute imposing such penalty. *Id.* 247, * * *

By another restrictive rule of construing penal statutes, if general words follow an enumeration of particular cases, such general words are held to apply only

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to cases of the same kind as those which are expressly mentioned, *id.* 247.”

Without deciding that these rules of strict construction are entirely and fully applicable at this day in this State, it is sufficient to say that they work against appellees' contention as to the construction of section 2 of the act. The appellees are not asking to restrain the general words of the section, but to expand and extend them. It is the appellant that asks to restrict the words of the section to their narrowest possible scope by confining them to horse racing alone, while the appellees want, under the guise of strict construction, to extend their meaning so as to include all kinds of racing between all kinds of animals, and all kinds of things, in order to reach a conclusion that the section is not covered by the title, that this court may declare it unconstitutional. The doctrine of strict construction of a penal statute does not serve appellees' purpose or aid them in their contention.

We come now to the objection that the act embraces more than one subject of legislation in creating and defining misdemeanors and prescribing punishment therefor, and authorizing the civil remedies and the institution of civil suits and prescribing rules of procedure therein.

In *Warren v. Britton, supra*, at page 23, it was said: “In the case at bar we are of opinion that the fees or salaries of county treasurers, the officers charged by the law with the collection of taxes, are matters properly connected with the subject of ‘An act concerning taxation;’ and that the closing sentence of section 251 of the act fixing the fees of such officers for collection of delinquent taxes, is a constitutional and valid enactment.”

The fee and salary law of 1879 contained a provision

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in relation to the publication of the delinquent list and the price thereof, and it was contended that the latter provision made the act embrace two subjects, and therefore void. It was said by this court of that statute that: "The act does not embrace two subjects. It makes provision for the performance of certain duties by public officers, and prescribes the compensation which shall be paid to officers or others rendering service to the public, in connection with public matters and official duties. Whatever is connected with official duty and is the subject of compensation from the public treasury, is within the act, and forms part of one general subject. * * * No provision of the constitution is invaded by gathering such provisions together in one general act." *Bitters v. Board, etc.*, 81 Ind. 125 (127). To the same effect are: *Benson, Admr., v. Christian*, 129 Ind. 535; *Farrell v. State*, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Reams v. State*, 23 Ind. 111; *Bank, etc., v. City of New Albany*, 11 Ind. 139; *State, ex rel., v. Sullivan*, 74 Ind. 121; *City of Indianapolis v. Huegele*, 115 Ind. 581; *Hunter v. Burnsville, etc., Co.*, 56 Ind. 213; *Walker v. Dunham, Sec'y of State*, 17 Ind. 483; *McCaslin v. State, ex rel.*, 44 Ind. 151.

The title of an act was "An act providing for the election or appointment of supervisors of highways and prescribing certain of their duties," under which there was a provision authorizing the supervisor to bring a civil suit for the obstruction of a highway to recover damages, and it was held not to embrace two subjects, and that such provision was properly placed under the title. *Indiana, etc., R. W. Co. v. Potts*, 7 Ind. 681. To the same effect is *Hines v. Aydelotte*, 29 Ind. 518.

Hingle v. State, 24 Ind. 28, is a case upon the question here involved, and is perhaps more frequently re-

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ferred to in the subsequent decisions of this court as furnishing a more correct standard than any other.

It was there said by Mr. Justice Frazer, whose name adds weight to the decision, speaking for the court, that: "The words 'subject' and 'matter' are often used as synonymous. Indeed, in the sense in which they are employed in the constitution, they are as nearly so as it is possible for two English words to be, and both are used simply to avoid repetition. The only difference between them is created by the offices which they are respectively made to perform in the clause in question. 'Every act shall embrace but one *subject*, and *matters* properly connected therewith, which *subject* shall be expressed in the title.' Now it is quite evident that the word 'subject' is here used to indicate the chief thing about which legislation is had, and 'matters,' the things which are secondary, subordinate or incidental. * * * Is the insertion in an act to regulate the liquor traffic, of a section conferring upon particular courts jurisdiction of cases prosecuted for its violation, within any of the mischiefs intended to be prevented? This question can only be answered in the negative, and such an answer conclusively disposes of this constitutional objection. We happen to have laws in force by the operation of which, when a new offense is created, some one of our courts can take jurisdiction of it. * * * In the absence of such statutes, the creation of a new offense would beget a necessity for conferring jurisdiction of it upon some court. Can there be a doubt then that the two things are properly connected, as the constitution requires? It really seems that to state the question ought to be sufficient."

That case and its reasoning are closely analogous to the case before us. If the civil remedy provided in the statute under consideration extended to the suppression of all violations of law and public morals, or any part

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of them, outside of the things made unlawful in the main part of the act, then the case referred to would have no bearing, and the act would embrace two independent and separate subjects of legislation. But the civil remedy provided has no connection with any other subject of legislation, either direct or remote. It has no connection with any other crime or misdemeanor than those defined in the act. Nor can it be used to suppress any other violation of law than those that fall within the provisions of the act.

It is necessarily and inherently connected with the main part of the act making horse racing and its incidents unlawful at certain times and under certain circumstances. Indeed, the connection between the two things is so inherent and necessary that the civil-remedy part of the act would be nugatory and fall to the ground without the main part of the act. It was designed as an additional and more efficient means of preventing a violation of the main part of the act. It was therefore a matter properly connected with the subject of the act, within the meaning of the provision of the constitution quoted.

It is further contended that the act violates section 22, of article 4, of the constitution, which forbids the passage of local or special laws upon the subject of "regulating the practice in courts of justice" among other things. That question is decided directly against such contention, in *Hingle v. State, supra*, and cases there cited, and *Board, etc., v. Silvers*, 22 Ind. 491; *Toledo, etc., R. W. Co. v. Nordyke*, 27 Ind. 95.

It is further contended that the act violates section 14, of article 1, of the State constitution, which provides that: "No person shall be put in jeopardy twice for the same offense." It is insisted that the defendant may be punished by a fine on a criminal prosecution and again

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made subject to an injunction and deprived of the use of his property, thus punishing him twice for the same offense or act. But the civil suit authorized by the act is not a criminal prosecution, and the injunction is not a punishment within the meaning of the section of the constitution cited. *State, ex rel., v. Vankirk*, 27 Ind. 121. But it is further contended that in case of a violation of an injunction under the civil-remedy part of the act the court might fine the defendant for contempt for disobeying the order of injunction, and that would make him liable to double punishment. The statement of that proposition furnishes a sufficient answer thereto. In that case he would not be punished for crime, but for contempt of court. *State, ex rel., v. Schoonover*, 135 Ind. 526 (21 L. R. A. 767); *State, ex rel., v. Stevens*, 103 Ind. 55.

It is also objected that the act as to the civil remedy part thereof violates the State and Federal constitutions in that it deprives the owner of his property without due process of law. This objection is founded on the fact that the act provides that the injunction may issue without any provision for a bond.

The contention is that so long as the injunction remained in force the defendant is deprived of the use of his property without recourse or remedy, though the injunction is afterwards dissolved because improvidently or wrongfully issued.

The same objections might be urged against that large class of injunctions where no temporary restraining order is asked, no bond given, and no injunction awarded until the final hearing, when a perpetual injunction is granted without bond, but which judgment is afterwards reversed on appeal. In that case the successful appellant has no remedy.

But it is a serious mistake to suppose that the injunc-

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tion provided for in any just or legal sense deprives the defendant of the use of his property. The fourth section authorizes the judge, in vacation, "to issue a temporary restraining order, restraining all persons from in any way violating or assisting in the violation of this act." And the section further provides for "notice to all concerned to appear and show cause, if any they have, why such order shall not continue until the final hearing." And the clear intent of the act is, that on the final hearing, if the facts set forth in the information are established by the evidence, the temporary injunction shall be made perpetual, of what use of the property does the injunction deprive the owner? None on earth, except a criminal use; none except that which is made criminal by the other part of the statute. The provision of the constitutions, State and Federal, securing to every person for injury done him in person or property due process of law, were never designed to protect him in the commission of crimes or misdemeanors. After the issue of the injunction, either temporary or final, the defendant or the owner may use his property for any and every purpose, except in violation of the criminal part of this statute. He may use it even for the purpose of horse racing and holding race meetings; "for the purpose of conducting races, or giving public exhibitions of trials of speed or matches between animals of the horse kind, wherein prizes, money, or reward is contested for by running, galloping, trotting or pacing," provided such meetings are not held oftener than three times in any year, and any such meeting is not held longer than fifteen days or oftener than twice in any period of sixty days, and that any such meeting is not held until after the full period of thirty days has elapsed after one such meeting has been held; and provided such races are not conducted at such seasons of the year as fall

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within the prohibition of section 1 of the act. That section only prohibits such races during certain months of the year.

But it is insisted that the charge against the defendant-owner may be false, and that while he is waiting trial he is suffering unjustly. If he is falsely charged in the information with a violation of the statute while he in fact is not violating it, the injunction will not interrupt him in pursuing the even tenor of his way.

Therefore, the injunction provided for does not deprive the owner of the free use of his property for any lawful purpose, and the statute does not deprive him of due process of law.

It is further contended that the civil remedy provided violates the constitution in depriving the defendant of a jury trial. That question, however, is not presented by the record, no jury having been demanded or refused.

It is further claimed that the act is void because it provided for an unwarrantable interference with the management of private property by its owner. "The legislative authority of this State is the right to exercise supreme and sovereign power subject to no restriction except those imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it." *Hedderich v. State*, 101 Ind. 564, and authorities there cited; *State, ex rel., v. McClelland*, 138 Ind. 395, and authorities there cited.

The right of the State to interfere with the use of private property by its owner, belongs to the police power of the State. It was said by this court in *Champer v. City of Greencastle*, 138 Ind. 339 (24 L. R. A. 768), that: "The police power of the State, so far, has not received a full and complete definition. It may be said, however, to be the right of the State or State functionary, to prescribe regulations for the good order, peace, health, pro-

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tection, comfort, convenience and morals of the community, which do not encroach on a like power vested in Congress by the federal constitution, or which do not violate any of the provisions of the organic law. Of this power it may be said that it is known when and where it begins but not when and where it terminates. But this power, whatever may be its limits, resides in the State in its sovereign capacity."

We think the act was a legitimate exercise of the police power of the State. *Fry v. State*, 63 Ind. 552; *Shuman v. City of Fort Wayne*, 127 Ind. 109 (11 L. R. A. 378); *Jamieson v. Indiana Nat. Gas and Oil Co.*, 128 Ind. 555 (12 L. R. A. 652); *Baumgartner v. Hasty*, 100 Ind. 575; *Powell v. Pennsylvania*, 127 U. S. 678; *Town of Lake View v. Rosehill, etc.*, 70 Ill. 191; *Tiedeman Lim. Pol. Power*, 203; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Eilenbecker v. Dist. Ct. Plymouth County*, 134 U. S. 31.

It is also urged that the act is unconstitutional because it provides in the fifth section that: "Any person having an interest in such property, whether made a party or not, shall be bound by the judgment." It is sufficient to say that no such party is now before this court raising such question, the only question presented being raised by the appellees, who were made parties to the information to which they successfully demurred. It will be time enough to decide that question when it is presented.

Another objection urged to the validity of the act is that it prohibits race meetings oftener than three times in any year, or oftener than twice in any period of sixty days, and within less than a period of thirty days between meetings throughout the entire State. That is, that if such a meeting should be held at the Roby race track at

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a stated period, and another should be held at Evansville in less than thirty days therefrom, those holding the latter would violate the statute. No such question is presented by the record before us, but all the races and race meetings complained of were held, proposed, and threatened to be held at the Roby race track in Lake county, Indiana. We will not go outside of the record to decide that question. It is further contended that the information is not good, because a proper construction of section 2, as appellees' counsel say, shows that it applies to persons and corporations, and prohibits any one of them from holding a meeting for a longer period than fifteen days, or oftener than prohibited, but another individual or corporation may hold a meeting succeeding a previous meeting held by some other person or corporation on the same track without the intervention of thirty days, and not amenable to the statute." The first clause of the section ending with the period is so framed as to make this construction very plausible, though it would tend to defeat the whole scope and object of the act, as gathered from the current history of the times, the evils that gave rise to the enactment, the evident purpose and intent of the Legislature as evinced in the language employed throughout the whole act, and in its several parts. But the language of the second clause following the period makes it plain enough that the construction contended for is not the correct one. It reads: "It shall be unlawful to hold any race meeting oftener than twice in any period of sixty days, and it shall be unlawful to hold any race meeting until after the full period of thirty days has elapsed after meeting has been held."

This language is broad enough to embrace all persons, corporations, companies and associations, and prohibits holding the meetings within the inhibited time, whether

held by the same persons, corporations, associations, companies, or different ones. Moreover, this construction makes the act a harmonious whole, and consistent with itself, while the other one makes the act inconsistent with itself, and incongruous. The former is the construction which the law requires us to place upon the section. Suth. Stat. Con., sections 339, 340, 341.

It follows from what we have said, that the circuit court erred in sustaining the demurrers to the information, and to each paragraph thereof. The judgment is reversed, the cause remanded with instructions to overrule said demurrers and for further proceedings not inconsistent with this opinion.

Filed June 22, 1895; petition for rehearing overruled September 27, 1895.

No. 17,214.

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APPELLATE PROCEDURE.—Evidence Excluded.—Presumption.—Evidence will be presumed on appeal to have been properly excluded, where it does not affirmatively appear that it was competent for the purpose for which it was offered.

SAME.—Reversible Error.—Refusal to Submit Interrogatory.—Refusal to submit an interrogatory as to the mental capacity of a testator is reversible error, under section 555, R. S. 1894, making it the duty of the court, on request, to require special findings of fact.

ESTOPPEL.—Contest of Will.—Advancement.—Heir.—A daughter is not estopped to contest her father's will, because of a conveyance of land by him to her, in the nature of an advancement, in consideration of which she agreed to make no claim against his estate.

EVIDENCE.—Physician and Patient.—Mental Capacity.—A physician, employed by testator, may testify as to facts in regard to the latter's mental capacity, learned or observed by him in a conversation with him, after the services were rendered, when he called upon him to collect his bill.

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SAME.—*Statements of Testator.*—*Mental Condition.*—*Will.*—Statements of a testator, three or four years before the execution of the will, tending to show his mental condition, may be given in evidence by a non-expert witness, as a basis for an opinion by her as to his competency to make the will.

SAME.—*Will.*—*Mental Capacity.*—*Declarations of Testator.*—The declarations of a testator, on the subject of making wills, are competent, on a contest of his will on the ground of mental incapacity.

SAME.—*Will.*—*Mental Capacity of Testator.*—*Tax Lists.*—Evidence that a testator, for several years before his death, did not make out his own tax-lists, but that they were made out and sworn to by his son, is admissible on the question of the testator's testamentary capacity.

SAME.—*Will.*—*Mental Capacity.*—A witness may testify to facts, tending to show the mental incapacity of a testator, although he gives no opinion as to the latter's sanity.

SAME.—*Motion to Strike Out, When Made Too Late.*—A motion to strike out evidence introduced on direct examination is too late when first made at the close of the cross-examination.

From the Clark Circuit Court.

Burt & Taggart, M. Z. Stannard and C. L. Jewett,
for appellants.

J. K. Marsh and W. H. Watson, for appellees.

JORDAN, J.—This action was instituted by the appellees in the Clark Circuit Court to contest the validity of the will of Andrew Bower, deceased. The complaint, *inter alia*, shows that the testator died in Clark county, Indiana, on July 18, 1892, leaving surviving him the appellees, who are his children and grandchildren and heirs at law. The will in contest bears date of September 5, 1887, and its validity is assailed upon the grounds:

1. That the testator at the time of its execution was of unsound mind.
2. That it was unduly executed.
3. That it was procured to be executed through the fraud of the defendants.

A trial by a jury resulted in a verdict in favor of the

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contestants, and over a motion for a new trial the court adjudged the will to be null and void, and revoked and set aside the probate thereof.

Appellants, in this appeal, have assigned five alleged errors of the trial court, but the 3rd and 5th are the only ones that are argued by their learned counsel, and therefore the consideration of the others must be deemed to be waived.

Appellants in the court below filed an answer to the complaint in two paragraphs. The first was a general denial. The second was intended to be in bar, and was directed to so much of the complaint as alleged a cause of action in favor of appellee Margaret C. Bower.

By this paragraph certain facts were averred showing that this appellee, who is a daughter of the deceased testator, had, on March 15, 1882, received from the latter a conveyance of certain described real estate, situated in the aforesaid county of Clark, and that said realty had been received by her in full consideration of all claims as an heir against her said father's estate, and it was therein prayed that by reason of said facts she be barred and estopped from prosecuting the action.

On motion of the appellee Eliza Bower, the court struck out this second paragraph, and by their third assignment appellants affirm that in this the court erred. They insist that the provisions made for appellee by the alleged conveyance of land to her were in the nature of an advancement, and in consideration of the facts that she received the same, and agreed to make no claim against her father's estate, she was estopped from joining as a contestant in this action. Counsel cite us to no authority, and we are not aware of any that will support this contention. If the conveyance of the property was by way of advancement in full of her interest as an heir in the estate under an agreement, then it

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perhaps might be a matter proper to be set up and considered against Margaret C., if the estate should come to be partitioned, or distributed under the statutes of descent. See section 2479, R. S. 1881; section 2636, R. S. 1894; section 1189, R. S. 1881; section 1203, R. S. 1894. See *Stokesberry v. Reynolds*, 57 Ind. 425; *Brown v. Brown*, 139 Ind. 653. This point, however, is not before us in this case, hence we do not decide it. In any event, however, we think that the facts set up in this paragraph were not in any way relevant as a defense in bar of appellee's right to contest the will. They did not confess and avoid the cause of action alleged in the complaint, nor tend to constitute a cause of defense thereto and would have served only to inject a collateral issue into the proceedings, and the court did not err in sustaining the motion to reject this paragraph.

Under the fifth assignment it is averred that the court erred in overruling the motion for a new trial. Appellants do not ask that we review the evidence in order to ascertain if it is sufficient to support the verdict of the jury. They say that it was a duty which rested upon the trial judge, and if any injustice was done by not sustaining the motion for a new trial upon that ground, the blame must be chargeable to him, and not to this court. It is next claimed that the court erred in not striking out certain declarations of the testator, testified to by Margaret C. Bower. The alleged objectionable evidence given by this witness is substantially as follows:

“He (referring to the testator) got to talking of some one that had made a will, and he said ‘it was foolishness for any man to make a will,’ and I said, ‘why, ain’t you going to?’ and he said, ‘No, I never allow to make a will,’ and I said, ‘why,’ and he said, ‘it was not right to make a will.’”

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The objections to this evidence as stated in the motion to strike out were :

1. That it was hearsay.
2. That these declarations were made prior to the execution of the will, and in the absence of the defendants.
3. Because they did not tend to support the opinion of the witness as to the mental condition of the testator at the time of the execution of the will.

This witness seems to have been examined by appellee, relative to the testator's alleged unsoundness of mind. She detailed to the jury conversations had with him, and his appearance, and condition for a number of years before the execution of the will, and on down to his death. These particular declarations, against which the objections are urged, were made in one of the several conversations referred to by this witness, and occurred as the witness said, about ten years prior to the trial, which apparently made the conversation occur about four years before the date of the execution of the will. After stating all of the facts to the jury, the witness was asked whether or no, in her opinion, the testator, was, at the time of the execution of the will in question, a person of sound or unsound mind, and she answered that she thought he was of unsound mind.

Appellants contend that the statements made by the testator in this conversation, about making a will, did not tend to support the opinion given by this witness, for the obvious reason, as they say that they were made some three or four years before the will was executed, and therefore, too remote from the time which the witness was asked to give her opinion. This witness was not an expert, and therefore, to render her opinion competent as to the mental condition of the testator, she was first required to state to the jury the facts upon which it was

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founded. This necessarily included what the testator said in conversations had, and the manner in which he conducted himself, etc. *Staser v. Hogan*, 120 Ind. 207.

While it is true that in cases like the one at bar, where the mental capacity of the testator is involved, the principal question under investigation upon this issue is, was he of unsound mind at the time the will in controversy was executed? However, as bearing upon the mental condition of his mind at this given time, facts and circumstances which tend to show his mental condition, both prior and subsequent to the execution of the will in contest, may be received in evidence. This rule is recognized by the decisions of this court. *Dyer v. Dyer*, 87 Ind. 13; *Staser v. Hogan*, *supra*. Of course the period of time that may be covered by the examination, relative to the mental capacity of the person in question, both prior and subsequent to the execution of the will, under all the circumstances in each particular case, must necessarily be left, to a great extent, to the sound discretion of the trial court, the abuse of which may be subject to review upon appeal.

Under the rule permitting a nonexpert to give an opinion, it may be, and frequently is, difficult to fix a limit to the facts about which the witness may testify, as it is evident that the weight of the opinion given must of necessity depend upon the facts upon which it is based. *Cline v. Lindsey*, 110 Ind. 337; *Burkhart v. Gladish*, 123 Ind. 337.

The opinion is of weight only so far as it is reasonably supported by the facts. The rule is well stated by a standard author :

“On the whole, the issue of mental soundness or unsoundness is not to be decided upon the mere opinions of witnesses, however numerous and respectable, but each opinion should be tested by the facts in the case, in

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order to judge of its probable correctness. It is not the opinion of witnesses upon which reliance is to be placed, by the triers of the case, but from the premises which supplied the conviction in the minds of the several witnesses, the court, or jury, aided by these opinions, and by the maxims of law, must form its own independent conviction and decide accordingly." Schouler Wills, section 209.

If any or all of the facts did not tend to sustain the opinion of the witness, counsel for appellants had the right of testing the same by a cross-examination for the purpose of enabling the jury to properly estimate the weight, if any, to which the opinion of the witness was entitled. *Johnson v. Thompson*, 72 Ind. 167; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544.

The declarations of a testator upon the subject of making wills are competent when his will is contested on the ground of mental incapacity. *Staser v. Hogan*, *supra*; *Conway v. Vizzard*, 122 Ind. 266.

It must be presumed, until the contrary appears, that the witness based her opinion, not alone upon the declarations of the testator relative to making a will, but upon all the facts and circumstances detailed by her.

As the declarations of the testator were admissible upon the issue of his mental capacity, we must presume that they were admitted for that purpose, and so considered by the jury. And the question as to the extent of support, if any, which they lend to the opinion given, was a matter to be determined by the jury. It follows that there is no apparent error in the action of the court in refusing to strike out this evidence.

On the trial Dr. W. P. McGlynn was called as a witness in behalf of the plaintiffs. He had been formerly employed by the testator as a physician. The court would not permit him to disclose anything in evidence

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of which he had acquired knowledge in the discharge of his professional duty, but ruled that the witness should be allowed to state what he had observed relative to the testator, independent of any facts ascertained by him in the course of his professional business. Under this ruling of the court the doctor was permitted to state that in the latter part of 1891, he went to see the testator for the purpose of collecting some money which was due him from the latter for services rendered him as a physician. He further testified that he met the testator in the road near his home, and that the old gentleman did not know him, and asked who he was, etc. The witness also testified as to the appearance of the testator upon this occasion, and also as to his mental and physical condition. It is insisted by appellants that this testimony was incompetent, for the reason that the knowledge of the facts stated, to some extent, was acquired by the physician in the discharge of his professional duty, and in support of their contention they cite *Heuston v. Stimpson*, 115 Ind. 62.

We cannot concur with counsel in this contention, that the witness testified in violation of the rule laid down in the case cited. What he learnt or observed in this conversation with the testator in the road, when he called upon him to collect the bill for services before rendered, did not come under the protection of the rule prescribed by clause four of section 497, of the Revised Statutes of 1881 (Section 505, R. S. 1894.) The disclosure of the facts stated by the testator under the circumstances, so far as it appears, certainly cannot be said to be forbidden by this statute. The call made by the witness was in relation to a financial matter, and in no manner akin to one made in the course of professional business. He did not expose or divulge any evidence, the knowledge of which he had acquired through pro-

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fessional relations with the testator. While it is true that the rule which forbids a physician to disclose in evidence, matters communicated to him in the course of his profession is a salutary one, nevertheless it cannot be extended beyond its evident letter and spirit.

It is also claimed that this evidence was not competent for the reason that, it was subsequent to the execution of the will. We have hereinbefore considered and passed upon this question, adversely to appellants' contention. James Fifer, a witness for appellees, testified relative to his acquaintance with the testator, and about conversations and transactions had with him before and after the execution of the will, down to some time in the year of 1891, or probably in 1892. He described his condition at these various times, and described his infirmities, which he, the witness, had observed. After detailing to the jury all of these facts, his direct examination closed without the witness giving, or being asked to express an opinion as to the sanity of the testator. At the close of the cross-examination of this witness by appellants they unsuccessfully moved the court to strike out all of his evidence except that relating to the borrowing of money, and the valuation of real estate, for the principal alleged reason, that no opinion was called for or given by him as to the mental condition of the testator. We think that this motion was not seasonably made by appellants for the reason that it should have been interposed before they began their cross-examination.

By this motion they, in effect, not only moved the court to reject the evidence elicited from this witness by the appellees, but that also given by him in response to their cross-examination. But barring this phase of the question, the ruling of the court upon the motion was correct. The failure upon the part of appellees to ask or to obtain the opinion of the witness did not render

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the facts stated by him, and otherwise competent, subject upon motion of the adverse party to be rejected and withdrawn from the jury. The rule which allows an opinion to be expressed is not imperative against the party calling the witness, but permissive of the right to ask for the opinion. It is said to be one of necessity, based upon the proposition that there may be something about the looks, deportment, etc., of the person whose mental condition is under investigation, that may conduce to the conclusion that he is of unsound mind, and which cannot be described in words by the witness. *Cline v. Lindsey, supra*, and cases cited.

The facts stated by the witness do not depend upon the opinion that may be given, and it is not the latter that makes them competent. The opinion, generally speaking, is only of value and weight to the extent that it is supported or borne out by the facts upon which it rests. Considering the reason on which the rule is founded, it is obvious, we think, that after the facts tending to show the mental condition of the person in question, have been elicited, it then becomes a matter optional, so far as the party calling the witness is concerned, whether he will exercise this right, and press the examination to the extent of asking him to express an opinion, or refrain from doing so, and leave the jurors to draw their own conclusions from the facts detailed by the witness. The motion to strike out this evidence was, therefore, properly overruled. Complaint is made upon the grounds that the township assessor, a witness for the appellees, was permitted to testify that for the years of 1891 and 1892, the testator did not make out his own tax-lists, and that these lists were made out and sworn to by his son, William E. Bower, one of the appellants. These tax lists seem to have been offered and admitted in evidence over appellants' objection along

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with that given by the witness relating thereto. The objections urged in the motion to strike out this evidence were: That it was a matter subsequent to the execution of the will, and that the declarations of the testator in the lists in question were made at a time, and upon an occasion, other than that upon which the will was executed. This testimony was not open to these objections, for the reason that it seems to be in line with other testimony given, tending to show that the testator, for some years prior to his death, had been unable to, and did not attend to his own business, and that it was transacted by his said son, William E. Bower. The fact that any of the appellants, or the testator's family, attended to his business, and otherwise treated him as being incapable to act for himself, was a proper matter to be shown at least as bearing upon his mental capacity. The assessor having stated that the tax lists were made out by the appellant, William E. Bower, they might be received, along with this evidence, as tending to corroborate that statement. Where evidence is not wholly incompetent in a cause for any purpose, it is not error to admit it. The action of the court in excluding the receipt of Margaret C. Bower, being the same mentioned in the second paragraph of the answer, and heretofore considered, is complained of and criticised by appellants. This document, which was offered in evidence by them, bears date of July 27, 1882, and is an acknowledgment upon the part of the appellee Margaret C., that she had received a certain tract of real estate from her father, the testator, and that she had agreed to make no further claims upon his estate.

At the time appellants offered this receipt in evidence, they stated to the court that they did so for the purpose of showing the relations existing between this daughter and her father, prior to the execution of the will.

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Prima facie, this paper was not relevant evidence under the issues in favor of appellants. We are not cited to any evidence in the record given by appellees, whereby it was rendered necessary for appellants to show the relations existing between the testator and this daughter, before the execution of the will. As it does not affirmatively appear that this evidence was competent, for the purpose for which the same was offered, under a well settled rule of appellate procedure, we must presume in favor of the ruling of the trial court.

Appellants at the proper time, and in due form, presented to the court five interrogatories, and requested that they be submitted to the jury and answers returned thereto, in the event that they returned a general verdict.

Of these the court submitted one and two, and answers thereto were returned by the jury. The record shows that these were the only interrogatories submitted to the jury, and they are as follows:

“First—Did the testator, Andrew Bower, on the 5th day of September, 1887, in the presence of Davis S. Allhands and Edgar O. Allhands, sign his name to the paper writing, which is the subject of this contest, as and for his last will and testament?”

“Second—Did Davis S. Allhands and Edgar O. Allhands, at the request, and in the presence, of the testator, Andrew Bower, sign their names to the paper writing, which is the subject of this contest, as attesting witnesses, after the said Andrew J. Bower had signed the same?”

The court rejected and suppressed the third, fourth and fifth, and this ruling of the court was separately assigned as reasons for a new trial. The fifth interrogatory is as follows:

“Fifth—Did the testator, Andrew Bower, at the time

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of the alleged execution of the paper writing, which is the subject of this contest, have mind and memory sufficient to understand the ordinary affairs of life, and act with discretion therein; and did he know his children and grandchildren, and have a general knowledge of the estate of which he was possessed?"

It is earnestly contended, and argued by appellants, that this interrogatory was pertinent and material to the issue on the question of the testator's sanity at the time of the execution of the will in contest, and they insist that under the holding of this court in the case of *Todd v. Fenton*, 66 Ind. 25, the action of the court in refusing to submit it to the jury cannot be sustained, and is clearly reversible error.

Appellees contend, that the interrogatory in controversy was obnoxious for the reason that it embraced more than one particular question of fact. They insist that there were three particular facts therein about which an inquiry was made, namely:

1. "Did the testator, Andrew Bower, at the time of the alleged execution of the paper writing, etc., have mind and memory sufficient to understand the ordinary affairs of life, and act with discretion therein?"

2. "And did he know his children and grandchildren?"

3. "And have a general knowledge of the estate of which he was possessed?"

By section 546, R. S. 1881; section 555, R. S. 1894, it is made the duty of the court, when requested by either party, to instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. The next following section provides, that, "when the special finding of facts is inconsistent with the general verdict the former shall control

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the latter, and the court shall give judgment accordingly.”

It is settled, by the decisions of this court, that where a party timely exercises this statutory right, and where other interrogatories that have been submitted to the jury, do not fully cover the pertinent and material points embraced in those requested, it will be prejudicial error for the trial court to refuse the latter. *Clegg v. Waterbury*, 88 Ind. 21; Elliott App. Proced., section 673 and 738; Elliott General Practice, section 911.

The case of *Todd v. Fenton*, *supra*, relied upon by appellants to sustain their contention, that the court erred in rejecting the interrogatory in question, was a proceeding to contest the validity of a will, and one of the grounds was the alleged insanity of the testator. Appellants in that case tendered and requested the court to submit to the jury certain interrogatories among which was the following, numbered eight:

“At the time said Elizabeth Todd signed said will, did she have mind and memory sufficient to understand the ordinary affairs of life and to act with discretion therein; did she know her children and grandchildren, and have a general knowledge of the estate of which she was possessed?”

This interrogatory the court refused to submit to the jury, and likewise others requested, but substituted in their stead certain other general ones and submitted the same to the jury, and answers were returned thereto.

It was held in that case that the court erred in refusing to propound the interrogatory above set out to the jury. By comparing interrogatory number five, in the case at bar, with the one rejected in the case cited, it is obvious that they are virtually identical. The only difference in effect being, that the former omits a feature urged as an objection to the latter: that of assuming

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the execution of the will. In considering the question of the suppression of the interrogatory in the Todd case, this court, by Worden, J., on p. 30, of the opinion, said :

“This question, we think, should have been propounded. It was pertinent to the issue on the question of sanity. It was sufficiently single. Did the supposed testatrix have sufficient mind and memory to understand and know and act as stated in the question? It sums up very fairly the mental capacity necessary to make a will. It admits of a direct affirmative or negative answer. If answered in the affirmative, it would show sufficient mental capacity to make a will, and such answer would control the answer given to the first interrogatory propounded, which we cannot regard as anything more than a general finding upon the issue of sanity.”

It is objected by the appellees, that the question rested “on an assumed fact.” We see no assumption in the question, except that Elizabeth Todd signed the will. This the appellants have the right to assume, because it was fully conceded that she signed it, in the complaint, in setting forth the grounds of contest. Again, it is objected, that the question was directed to matters of evidence, and fell short of any material fact in the case. It was directed to matter of fact concerning which evidence had been given, and not to matters of evidence; and in our opinion it did not fall short of any material fact in the case. If the testatrix had mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein, to know her children and grandchildren, and to have a general knowledge of the estate of which she was possessed, she had sufficient capacity to make a will.”

The learned counsel for appellees seek to parry the force of this decision by insisting that it has been indi-

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rectly overruled by later decisions of this court. But none are cited, and we have been unable to discover any that can be held to have that effect, and until it is made to appear that the holding in that case upon the point involved is not sound, we are constrained to give it our adherence, and adjudge that it is controlling upon the question now presented. The two, and only interrogatories submitted to the jury and answered by them, sought to elicit responses as to whether or not the will had been properly signed and published by the testator, and attested by witnesses. They had no relation whatever to the facts involved in the one rejected. There is evidence in the record, which entitles appellants as a matter of right to ask for a special finding upon the particular questions presented by the excluded interrogatory. Other questions arising upon the suppression of interrogatories three and four, and upon certain instructions given and refused by the court, are argued by counsel, but we do not deem it necessary to consider the same and thereby extend this opinion. However, we may suggest that these two latter interrogatories might have been framed so as to have more appropriately embraced the question of fact pertinent to and involved in the issue of fraud or undue influence, and probably are faulty for the reasons claimed by appellees, but as to that question we express no opinion.

For the error of the court in suppressing interrogatory number five, the judgment is reversed, and the cause remanded with instructions to the trial court to sustain the motion for a new trial. All concur.

Filed October 9, 1895.

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No. 17,509.

WEST CREEK TOWNSHIP ET AL. v. MILLER.

DRAINAGE.—Remonstrances.—Refiling as to New Report.—Remonstrances filed to the original report of drainage commissioners, are not good without refileing, as against a new report, under R. S. 1894, section 5625, providing that on sustaining a remonstrance the court may direct amendment of the report, or a new report, and that any person whose lands are reported as affected “may remonstrate” against the new report within the same time as against the first report.

SAME.—New Report.—Notice.—Remonstrance.—Lack of knowledge or notice of the filing of a new report by drainage commissioners is no excuse for the failure of one who remonstrated against the first report, to file remonstrances against the new report.

SAME.—Remonstrances.—Original Report.—New Report.—Drainage commissioners do not recognize remonstrances to their original report, and so make them good, as against a new report, by moving to strike them out after making such new report.

SAME.—Issues.—Admission.—Swearing of Witness.—The swearing of a witness by direction of the court, in drainage proceedings, is not an admission by the petitioners that issues are made up so as to make a remonstrance to the original report of the drainage commissioners good, as against a new report by them.

SAME.—Report.—Omission as to Grades, Courses, and Distances.—Referring Back.—The omission from a report of drainage commissioners, of matters as to grades, courses, and distances of the proposed ditch, which are required to be stated therein by R. S. 1894, section 5624, authorizes a reference back for revision of the report as “not according to law.”

From the Lake Circuit Court.

T. J. Wood, for appellants.

T. S. Fancher, for appellee.

HOWARD, C. J.—This was a proceeding under the act of April 6, 1885 (Acts 1885, p. 129; R. S. 1894, section 5622, and following sections), for the construction of a public drain in Lake county.

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The bill of exceptions shows that the appellants filed remonstrances containing the statutory grounds against the report of the commissioners of drainage; and that thereupon the court referred the report back to the commissioners with orders to file a new report on the first day of the next term, November 19, 1894. The court did not set aside the first report, and there was no hearing when the same was referred back; but the commissioners were directed to re-examine the proposed ditch after meeting at a designated time and place, and make further report, which was done.

The new report was in fact the old report refiled, with the addition of a statement by the engineer giving the levels of the ditch, its courses and distances, and specifications showing how it should be constructed. There was also a statement added of a re-survey of a part of the ditch. The report was re-sworn to.

It is stated also in the bill of exceptions that neither the appellants nor their attorneys had any knowledge or notice of the filing of the new report on November 19, 1894.

On the day of the trial, December 13, 1894, the appellants moved the court to allow their original remonstrances against the assessment of benefits as made in the first report to stand against the new report, on the ground that there was no change made in any of the assessments. This motion was overruled, and the ruling excepted to.

It is further shown that the appellants also moved the court to allow said remonstrances to stand to the new report, on the ground that the petitioner had moved to strike out said remonstrances, for the reason that the causes therein were not well stated. On this motion the court made no ruling, to which failure to rule upon said motion appellants also excepted.

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It appears, in addition, that the court directed that one of the appellant trustees be sworn on the trial, and that when said trustee was interrogated as to the question of benefits and damages in case said ditch should be dug, the petitioner objected to his testimony, and the objection was sustained on the ground that there was no remonstrance on file calling the assessments in question.

The rulings complained of are all brought up as reserved questions of law under provisions of section 642, R. S. 1894 (section 630, R. S. 1881), and are properly before us by bill of exceptions.

One question only is presented by the rulings complained of: Did the remonstrances filed to the original report stand good, without re-filing, as against the new report of the drainage commissioners? Under the provisions of the drainage statute, we think they did not.

It is provided in section 4, of that act, *supra* (section 5625, R. S. 1894), that on the filing of the remonstrance, if the first cause of remonstrance is held to be true, namely, that the report is not according to law, the court may direct the commissioners to amend and perfect their report; "or the court may in its discretion set aside said report, refer the matter back anew to said commissioners for a new report."

The latter course, substantially, was taken in this case, although there was not a formal setting aside of the first report, but a new report was in fact filed. The same section of the statute provides that in such case, "when said new report is made and filed any person whose lands are reported as affected may remonstrate within the same time therefrom and for the same causes as it is hereby allowed to remonstrate against the first report."

It is not claimed that any remonstrance was in this case filed to the last report; but it is argued that the

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remonstrances to the first report stood good also to the last. We do not think the statute contemplates such a procedure. On the contrary, the statute evidently assumes that the new report will be, in some essential respects, different from the original, and provides expressly for filing remonstrances anew. It may well be that the new report will obviate the objections to the old one, and that no remonstrance will therefore be necessary or available.

As a reason, apparently, for not filing a remonstrance to the new report in the case before us, it is shown that appellants had no knowledge or notice of its filing. This, however, could be no excuse. The remonstrants, both by the original notice given to them and by their appearance to the first report, were in court for all the purposes of the case.

Neither is it true that, by moving to strike out the original remonstrances, appellee thereby recognized such remonstrances, and so made them good. The remonstrances, by force of the statute, did not exist as against the new report. The last report stood as the revised act of the commissioners; and, in the absence of further remonstrance, must be presumed correct.

It is further urged by counsel, that since the only reason given in the statute why the original report may be referred back to the commissioners is, that the report "is not according to law;" whereas, the additional statements in the new report as filed are matters of fact, and not of law, namely, the giving of the levels of the ditch, its courses and distances, and the specifications showing how it should be constructed; therefore the report should not have been referred back in the first instance.

We do not think appellants are in position to make this objection to the action of the court. Not only was

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the report referred back without objection from the appellants, but the action taken was in apparent compliance with their remonstrance.

The additional matters besides, which are found in the new report as to the grades, courses and distances of the ditch, are such as by section three of the drainage act, *supra* (section 5624, R. S. 1894), are required to be stated in the report of the commissioners. As these matters were omitted in the first report, that report was certainly "not according to law," and was therefore properly referred back to the commissioners for revision.

Nor does it follow because a witness was sworn in the case by direction of the court, that it was thereby admitted by the petitioner that issues were made up, in such sense that the remonstrance to the original report was good also against the new report. The witness might be sworn for the information of the court, or for other reasons. As soon, however, as he was asked to give evidence, such as might be admissible under the remonstrance, his testimony was objected to. The remonstrance, as we think, was not before the court either in fact, or by the admission of the petitioner.

The judgment is affirmed.

Filed October 9, 1895.

No. 17,579.

RUND v. THE TOWN OF FOWLER.

MUNICIPAL CORPORATION.—Town Ordinance.—Reasonableness of.—Courts.—The courts will not inquire into the wisdom or reasonableness of an ordinance which a town has power to pass and enforce, unless it violates some constitutional provision.

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SAME.—Town.—Estoppel.—Slaughter House.—A town is not estopped to claim that a slaughter house within the corporate limits violates an ordinance, merely because its location was directed and consented to by the town trustees, unless such direction or consent was taken by corporate action in some method recognized by law.

SAME.—Town Ordinance.—Slaughter House.—Nuisance.—A town ordinance, declaring that slaughter houses within the corporate limits shall be deemed public nuisances, and making it unlawful to maintain any within such limits, is authorized by section 4357, R. S. 1894, giving the board of trustees power to declare what shall constitute a nuisance and to direct the location of slaughter houses.

SAME. — Slaughter House. — Nuisance. — Ordinance. — A slaughter house, erected or conducted in violation of an ordinance prohibiting its maintenance within the corporate limits of the town, becomes a nuisance, although it would not be such in the absence of such ordinance.

From the Benton Circuit Court.

D. Fraser and W. Isham, for appellant.

J. T. Brown and E. G. Hall, for appellee.

HACKNEY, J.—This is an appeal from the judgment of the lower court, assessing a penalty against the appellant for the violation of an ordinance of said town. The appellant insists that the ordinance is invalid, first, because the appellee had no power to pass it, and, second, because its provisions are arbitrary and unreasonable. The first section declares that slaughter houses within the corporate limits of the town shall be deemed public nuisances. The second section, with the violation of which the appellant was charged, provides that: “It shall be unlawful for any person or persons or corporation to maintain or operate any slaughter house within the corporate limits of said town.” Section 3 prescribes the penalties for violating said second section.

The statute defining the powers of town corporations, section 4357, R. S. 1894 (3333, R. S. 1881), provides that the board of trustees shall have power: “Fourth,

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to declare what shall constitute a nuisance, and to prevent, abate, and remove the same; and to take such other measures for the preservation of the public health as they shall deem necessary. * * * Eighth, * * * to direct the location of slaughter houses." Upon the question of the express power of the appellee to adopt and enforce the ordinance before us, the appellant's counsel confine their argument to the last quoted provision of the statute, insisting that the power to direct the location does not include the power to exclude from the corporate limits or to declare the maintenance of slaughter houses to constitute a nuisance. If this provision stood alone, we should not incline to the view that the ordinance in question exceeded the power given. Its effect is certainly to provide that slaughter houses shall not be located within the corporate limits, and that a violation of this direction shall bring the penalty prescribed.

The ordinance finds support as the exercise of a police power, and has for its object the preservation of the public health. This power is given by the provision of the statute first quoted: "To declare what shall constitute a nuisance * * * and to prevent * * the same." The ordinance in question declares that a slaughter house, within the corporate limits of the town, shall be deemed a public nuisance, and the penalty prescribed is intended to prevent the establishment or maintenance of such nuisance. The general grant of power following that first quoted is of great scope, and manifests the intention of the Legislature to intrust to the municipality large discretion in the enactment of "measures for the preservation of the public health." It is possibly true, as counsel insist, that a slaughter house is not *per se* a nuisance, and that it is possible for the municipality

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to exceed its power by declaring, arbitrarily, that to be a nuisance which, neither from its character nor the manner in which it is controlled or conducted, is a nuisance. However, a slaughter house erected or conducted in violation of the ordinance becomes a nuisance, though it may not have been such in the absence of such ordinance. Nor can it be said that this appeal may be maintained, because the ordinance, so far as it declares a slaughter house within the town limits to be a nuisance, is an arbitrary declaration against a business not otherwise a nuisance. The penalty from which the appeal is prosecuted is for maintaining a slaughter house within the town limits. As we have said, the right to direct the location of such houses is given by the letter of the legislative grant, and the penalty is assessed for the failure to obey the direction that such houses shall not be located within the corporate limits. The power given has been exercised by excluding them from a particular locality. This is but the equivalent of a direction that they shall be located without the corporate limits.

Where power exists to pass and enforce an ordinance, as we hold that it does in this case, there can be no inquiry by the courts into the wisdom or reasonableness of the power or its exercise, unless it infringe some provision of the constitution. *Steffy v. Town of Monroe City*, 135 Ind. 466, and authorities there cited.

The answer of the appellant, that the slaughter house was given its location by the direction and with the consent of the town trustees, is not available as an estoppel without allegations that such direction or consent was by corporate action taken in some method recognized by law, if indeed an order regularly entered of record by the board in session would estop the corporation to take subsequent action to the contrary. See *Barthet v.*

City of New Orleans, 24 Fed. Rep. 563; 9 Am. and Eng. Corp. Cas. 509.

Finding no error in the record, the judgment of the circuit court is affirmed.

Filed October 9, 1895.

No. 16,465.

PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS R. W. COMPANY v. O'BRIEN ET AL.

BILL OF EXCEPTIONS. — Filing. — Record. — Appellate Procedure —

A bill of exceptions cannot be considered on appeal, where there is nothing to show that it was ever filed in the office of the clerk of the trial court.

APPELLATE PROCEDURE. — Waiver of Error. —An error in overruling a demurrer is waived by failure to discuss the same in appellant's brief.

SPECIAL FINDING. — Quieting Title. — Tenants by Entirety. — Real Estate. —Failure to find that plaintiffs are husband and wife, is fatal to a judgment in their favor, in an action to quiet title to land, of which they allege they are "owners in entirety."

EJECTMENT. — Burden of Proof. —The burden of establishing, by affirmative proof, his title and right to possession, is upon plaintiff, in an action to recover possession of land.

SAME. — Complaint, Necessary Averment. —A complaint in an action to recover possession of land is fatally defective, where it fails to allege, as required by section 1066, R. S. 1894, that the plaintiff is "entitled to possession."

From the Tipton Circuit Court:

C. H. Burchenal, J. L. Rupe, R. P. Beauchamp and W. W. Mount, for appellant.

J. O'Brien and C. Wolfe, for appellees.

MCCABE, J.—The appellees sued the appellant in the Howard Circuit Court, in a complaint of two para-

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graphs, the first of which was to quiet the title of the plaintiffs to, and the second was to recover possession of, lots 19 and 50 in T. J. Faulkner's addition to the city of Kokomo, in Howard county, Indiana.

The venue was changed to the Tipton Circuit Court, where a trial of the issues, formed upon the complaint, resulted in a special verdict, upon which the plaintiff below had judgment, quieting their title and recovering the possession. The errors assigned call in question the action of the circuit court in overruling a demurrer to each paragraph of the complaint, in overruling appellant's motion for a *venire de novo*, in overruling appellant's motion for judgment in its favor on the special verdict, and in rendering judgment in favor of appellees upon the special verdict.

The second paragraph of the complaint is fatally defective in its failure to state that the plaintiff was entitled to possession of the lots. The statute provides that: "The plaintiff in his complaint shall state that he is entitled to possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession." Burns R. S. 1894, section 1066; R. S. 1881, section 1054; *Leary v. Langsdale*, 35 Ind. 74; *McCarnan v. Cochran*, 57 Ind. 166; *Vance v. Schroyer*, 77 Ind. 501; *Levi v. Engle, Admr.*, 91 Ind. 330; *Mansur v. Streight*, 103 Ind. 358; *Simmons v. Lindley*, 108 Ind. 297; *Miller v. Shriner*, 87 Ind. 141.

Strong as these authorities are in support of the error assigned on the ruling, overruling the demurrer to the second paragraph of the complaint for want of sufficient facts, the appellant has waived it by the failure to discuss the same in its brief.

The substance of the special verdict is: That the railroad track, the defendant now owns and operates through

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Howard county, Indiana, was located where it now is in 1851 and 1852, under a charter originally granted to the New Castle & Richmond Railroad Company and an extension of the charter of said company made in 1851, and the name of the company was changed before the railroad was completed to the Cincinnati, Logansport & Chicago Railroad Company, by which last named company the most of the work of construction thereof had been done through Howard county.

Prior to the establishment of said railroad through Howard county, Thomas J. Faulkner was the owner of the northwest quarter of section 31, township 24 north, range 4 east, and said railroad route, now owned by said defendant, was located upon said quarter section then owned by Thomas J. Faulkner.

Afterwards, said Faulkner caused a part of said land to be surveyed and platted as an addition to the town, now city, of Kokomo, Indiana, and acknowledged the same on May 5, 1866, and recorded on said day in the record of such plats kept in the recorder's office of Howard county, Indiana, said plat containing lots numbered from 1 to 50, both inclusive of different sizes and shapes, as shown on the said plat; said addition was located on both sides of said railroad route; and said lots were located up to within $17\frac{1}{2}$ feet of the center of said railroad track on either side thereof.

Said lots 19 and 50 were located on the east side of said railroad track and adjoining said track, as described in said plat, and west of Sherman avenue and north of George street, as indicated on said plat.

On November 18, 1869, Thomas J. Faulkner and wife deeded to Napoleon B. Brown said lots 19 and 50, with a number of others, in said addition, for \$700. In ascertaining the amount of ground in the lots so deeded, they were measured and paid for by the acre, and said lots,

19 and 50, with others, to within $17\frac{1}{2}$ feet of the center of said railroad track.

Prior to the time of the conveyance of said lots 19 and 50, they were fenced to a line near $17\frac{1}{2}$ feet on the east side of the center of said track, and occupied by said Faulkner as a garden or truck farm, and so continued to be used for two years or more after said Brown became the owner thereof. Afterwards, the fence became worthless and the lots lay out as commons until some four to six years ago, when the defendant company, or some of its predecessors in ownership, put a fence on the east side of its track, 40 feet, or nearly so, from the center of its track, where it yet remains.

Afterwards, on April 21, 1890, said Brown and wife made a warranty deed for lots 19 and 50 to the plaintiffs, James and Charlotte Louisa O'Brien, subject to any unpaid taxes or outstanding tax titles.

On February 11, 1880, the auditor and treasurer of Howard county sold said lots 19 and 50 to Gustav R. Frees, who transferred his claim to Lewis Mergenthein, who took a tax deed therefor on February 16, 1882, and Mergenthein deeded said lots to the plaintiffs on April 21, 1890, they having been sold by said officers as the property of said Brown.

On March 22, 1887, William A. Stewart received a tax deed for lot 19 from the treasurer of the city of Kokomo, and on May 21, 1890, said Stewart deeded said lot to the plaintiffs.

The defendants in this action are entitled to all the rights of all its predecessors in ownership of said railroad route.

The plaintiffs have title to lots 19 and 50, as laid out and located by said Faulkner in his plat aforesaid.

The predecessor in ownership of the defendant, who obtained the right to locate defendant's road over the

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land of said Faulkner, embracing said lots 19 and 50, obtained 35 feet in width through said land, and no more at the place where said lots are situated, and neither the defendant, nor any of its predecessors, ever had or used more than $17\frac{1}{2}$ feet from the center of their track, and on the east side thereof, adjoining lots 19 and 50, until four to six years ago.

That the plaintiffs have been damaged by the detention of the part of said lots in the sum of three dollars.

The facts thus found do not justify a judgment recovering the possession by the appellees because it is nowhere found that they were entitled to possession. That, as we have seen, was a fact indispensably necessary to be alleged in the complaint to make it good, and it was equally necessary that the fact should be found. But the fact is neither alleged nor found. Had it been found, the verdict would still have been ill, because that finding would have been outside of the issues and ineffective. Burns R. S. 1894, *supra*; *Leary v. Langsdale*, *supra*; *McCarnan v. Cochran*, *supra*; *Vance v. Schroyer*, *supra*; *Levi v. Engle, Admr.*, *supra*; *Mansur v. Streight*, *supra*; *Simmons v. Lindley*, *supra*; *Miller v. Shriner*, *supra*; *Swaynie v. Vess*, 91 Ind. 584.

In an action for possession of real estate the burden is upon the plaintiff to establish by affirmative proof his title and right to possession. *Roots v. Beck*, 109 Ind. 472. That being so, the failure to find that the appellees were entitled to possession is equivalent to a finding that they were not entitled to possession. *Henderson v. Dickey*, 76 Ind. 264; *Graham v. State, ex rel.*, 66 Ind. 386; *Johnson v. Putnam*, 95 Ind. 57; *Par-mater v. State, ex rel.*, 102 Ind. 90; *Glantz v. City of South Bend*, 106 Ind. 305; *Louisville, etc., R. W. Co. v. Hart*, 119 Ind. 273 (4 L. R. A. 549); *Town of Fowler v. Linqvist*, 138 Ind. 566; *Manor v. Board, etc.*, 137

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Ind. 367, and cases there cited; *Brazil, etc., Co. v. Hoodlet*, 129 Ind. 327.

The finding, then, is in legal effect that the appellees are not entitled to possession; that finding precludes and prevents a judgment quieting title in them; because, as was said in *Ragsdale v. Mitchell*, 97 Ind. 458, pp. 461-2, "An action to quiet title does not merely settle title so far as to invest the plaintiff with possession. It does much more than this when successfully prosecuted; it sweeps away all claims and liens which impair the complainants' title."

If the appellees have no right to possession as the verdict in effect finds, then a judgment quieting title in them would be unsupported by the verdict and finding, because such a judgment and decree would invest the plaintiffs with the right of possession, the very thing the verdict finds they were not entitled to. We do not mean to hold that a plaintiff cannot maintain an action under our statute to quiet title to real estate unless he is also entitled to the possession thereof. In such a case where he is not entitled to possession, he must in his complaint state at least the nature of his interest or title, showing that it is consistent with the right of possession in the defendant or somebody else.

As was said in *McMannus v. Smith*, 53 Ind. 211, which was an action to quiet title: "In pleading a fee-simple, it is only necessary to state it, because it includes the entire interest in the land; but in pleading an estate in lands less than a fee-simple, it must be particularly described, or it would not appear what part of the fee-simple it was, either in quantity of estate, time of its duration, or whether in severalty, coparcenary, or in common, or what one of the numerous parts into which the fee-simple may be divided." The first paragraph of the complaint stated a fee-simple in general terms and

hence a decree, quieting title in them under it, would invest them with the right of possession.

But there is another reason why the facts found are not sufficient to authorize a judgment quieting title in the appellees. They alleged a particular title in the first paragraph seeking to quiet the same, namely, that: "Plaintiffs are the owners in entirety * * of the following described real estate in Howard county in the State of Indiana, viz:" and then follows the description of the lots.

This description of the plaintiffs' title can only be construed to mean what was known at common law and under our statutes as an estate by entireties. Burns R. S. 1894, sections 3341, 3342 (R. S. 1881, sections 2922, 2923); *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Ind. 305; *Chandler v. Cheney*, 37 Ind. 391; *Jones v. Chandler*, 40 Ind. 588; *Carver v. Smith*, 90 Ind. 222; *Thornburg v. Wiggins*, 135 Ind. 178 (22 L. R. A. 42); 6 Am. and Eng. Ency. Law, 894, and authorities cited.

In ejectment it is sufficient to state the plaintiffs' title without stating its source in the complaint. *McMannus v. Smith*, *supra*. But when the source of the plaintiffs' title is alleged, no other can be proven even in an action to quiet title. *Ragsdale v. Mitchell*, *supra*; *Johnson v. Pontious*, 118 Ind. 270; *Grissom v. Moore*, 106 Ind. 296. In *Ragsdale v. Mitchell*, *supra*, which was a suit to quiet title, Elliott, J., speaking for the court, said: "The title of the appellee is specifically described, and as he can only recover according to the allegations of his pleading, he must recover upon the title pleaded. It may not be necessary to specifically describe a title, but when the pleader does describe one title, and does describe it specifically as the only title upon which he relies, his recovery must be had upon his title as laid

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Stephen Pl., 304; Sedg. & Wait Trial of Title, section 343. According to the statements of the complaint, the title which the plaintiff purchased was such, and such only, as the sale and conveyance by the assignee could transfer, and if this title is sufficient to cut off the rights of the wife, then the complaint is good, otherwise it is not; for as this is the title specifically described and exclusively relied on, the recovery must be had upon that or not at all."

Title by entreties can only be created in this State by a conveyance to a husband and his wife. Burns R. S. 1894, sections 3341, 3342, (R. S. 1881, sections 2922, 2923); *Davis v. Clark, supra*; *Arnold v. Arnold, supra*; *Chandler v. Cheney, supra*; *Jones v. Chandler, supra*; *Carver v. Smith, supra*; *Thornburg v. Wiggins, supra*; and it was the same at the common law. 6 Am. and Eng. Ency. Law, 894, and cases there cited.

It is probably true that the plaintiffs were husband and wife, but the fact is neither alleged nor found. It was perhaps sufficient to allege that they were tenants by entreties or that they were owners by entreties. Under this allegation the relationship might be proven and the joint deed to them could also be proven. But neither fact is found. There are other defects in the special verdict which we deem it unnecessary to point out. The circuit court erred in rendering judgment on the special verdict.

The controlling questions as to the merits of the controversy between the parties arise on the overruling the motion for a new trial, which cannot be determined without the evidence. And, unfortunately, the evidence is not in the record, though it was attempted to be incorporated therein by means of a bill of exceptions, but there is nothing to show that it was ever filed in the clerk's office of the circuit court. This must be shown

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by the transcript. *Shulse v. McWilliams*, 104 Ind. 512; *Loy v. Loy*, 90 Ind. 404; *Stewart v. State*, 113 Ind. 505; *Downey v. Head*, 138 Ind. 503; *Board, etc., v. Huffman, Admr.*, 134 Ind. 1; *Guirl v. Gillett*, 124 Ind. 501; *Shewalter v. Bergman*, 132 Ind. 556.

The judgment is reversed, with instructions to grant a new trial.

Filed October 9, 1895.

No. 17,414.

UNITED STATES SAVING FUND AND INVESTMENT CO.
v. HARRIS ET AL.

PLEADING.—*Answer, When Demurrable.—Infancy.—Note.—Mortgage.*

—An answer, setting up defendant's infancy as a full defense, both to a note and mortgage, is demurrable, where it is a defense only to the note.

SAME.—*Complaint, When Not Demurrable.—Relief.*—A pleading, in the nature of a complaint, is not demurrable, where it states facts showing that plaintiff is entitled to any of the relief demanded.

REAL ESTATE.—*Conveyance.—Disaffirmance of Mortgage by Infant Feme Covert.—Restoring Consideration.—Statute Construed.*—The term "conveyance of real estate," as used in sections 3364 and 3365. R. S. 1894, relating to conveyances of land by infant *feme coverts*, comprehends mortgages of real estate as well as deeds of conveyance; and before such *feme covert* can disaffirm her mortgage she must restore the consideration received, although she may disaffirm the note secured by the mortgage, thus avoiding personal liability.

From the Hendricks Circuit Court.

Cofer & Hadley, N. M. Taylor and Hogate & Clark,
for appellant.

C. Foley, for appellees.

MCCABE, J.—The appellant sued the appellees to foreclose a mortgage executed by them on real estate.

The circuit court overruled a demurrer to the separate answer of appellee Lotta B. Harris, sustained the demurrer of said appellee to appellant's reply to her separate answer, and sustained the demurrer to the answer of appellant to the separate counterclaim of said appel-

142	226
142	182
142	226
149	213
142	226
156	570
142	226
157	681
142	226
158	132
158	552
142	226
161	316

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lee. The issues formed were tried by the court, resulting in a finding and judgment in favor of said appellee Lotta B., and a finding and judgment against the appellee John W. Harris, foreclosing the mortgage as to him.

The errors assigned by appellant call in question the rulings upon demurrer above mentioned.

The appellee John W. Harris assigns for cross-error, that the circuit court sustained appellant's demurrer to the separate partial answer of said appellee John W.

And appellee, Lotta B. Harris, assigns for cross-error, that the circuit court overruled her objection and exception to the rendition of judgment of foreclosure against her co-appellee.

The substance of the separate answer of appellee Lotta B. Harris, by her guardian *ad litem*, is that she was born on January 13, 1876, and hence was an infant when the note, bond and mortgage sued on were executed, to-wit: January 20, 1893; she being at that time but seventeen years of age; that she was married to her co-defendant, John W., on February 1, 1892, and has ever since been his wife; that on October 19, 1892, her father and mother made a gift to her and her said husband of the real estate described in the mortgage, and conveyed the same to them by a general warranty deed, designating and describing them therein as husband and wife, the granting part of which reads thus: "Convey and warrant to John W. Harris and Lotta B. Harris, his wife," then follows the description of the real estate conveyed, the same being a lot in the town of Danville, Hendricks county, Indiana; that said deed was duly recorded in the recorder's office in said county on October 29, 1892, which was more than three months before the note and mortgage sued on were executed. That the only right, title, or interest which she

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and her said husband, or either of them, had in or to said real estate at the time said mortgage was executed, or ever had therein, is by virtue of said deed of conveyance; that at and before the time of the execution of the mortgage sued on, and before the plaintiff loaned the money sought to be secured by said mortgage, or parted with any value on account thereof, appellant's executive officers knew that this defendant was under the age of twenty-one years, and would not arrive at that age until long after the execution of the mortgage and the making of the loan; that she did not, either before, or at the time of, the execution of said mortgage or the making of said loan, state or represent in writing to the plaintiff that she was twenty-one years of age.

The substance of appellant's reply to the foregoing answer is that the amount specified in the bond and mortgage sued on, was money borrowed by the defendant Lotta and her co-defendant John W. Harris, for the purpose of paying for labor and material for a dwelling house, out houses and other buildings constructed on the real estate owned by them as aforesaid and described in the complaint, and that the same was actually used for that purpose and for no other; that said John W. Harris was, at the time said money was loaned and when the bond and mortgage sued on were executed, a person of the full age of twenty-one years; that the defendants, nor either of them before or after this suit was brought, paid or offered to pay said sum of money so loaned by the plaintiff to the defendants, or any part thereof, nor have they brought said money into court or any part thereof for the use and benefit of the plaintiff, nor have they restored or offered to restore to the plaintiff the consideration received from it for the bond and mortgage sued on.

The separate counterclaim of appellee Lotta B. Har-

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ris only differs from her separate answer in that it sets out by exhibits the note or bond and mortgage sued on, and asks for affirmative relief, that it be adjudged that said note or bond and mortgage sued on are null and void and of no effect, and said real estate be forever released therefrom.

The appellant's answer to the separate counterclaim of said appellee Lotta B., is substantially the same as its reply to her separate answer, the substance of which reply is already set forth above. So that it appears the same question is substantially presented by the ruling on the several demurrers to the several pleadings above outlined; and that question is, can an infant *feme covert* disaffirm her mortgage in which her husband, over twenty-one years of age joined, without restoring the consideration she has received therefor? The ruling on the demurrer to appellant's answer to the separate counterclaim of Lotta B. Harris, raises the further question whether an infant *feme covert* can disaffirm her note or bond.

It is contended by the appellant's counsel that appellee Lotta B. Harris, though an infant when she executed the mortgage in suit, cannot disaffirm it without restoring the consideration she received therefor. It is conceded on both sides that at common law all infants may disaffirm all contracts that are voidable merely into which they may have entered, unless it be implied contracts for necessities, and that the contract here involved is not one for necessities. But it is contended by the appellant that the Legislature has changed that feature of the common law by statutory enactment. The appellees contend that the legislative enactment relied on by appellant has no application to mortgages. The question, therefore, depends upon the proper construction of that statute.

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The statute in question reads as follows: "1. In all sales by an infant *feme covert* of lands belonging to her, and in which sale and conveyance her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale until she shall first restore to the person owning said real estate the consideration she received for said land: *Provided, however,* That if she will allege in her complaint that she received no consideration for said sale, an issue may be made upon such allegation; and if, upon trial, the Court or jury find that any consideration was received by her, the Court shall, in the finding and decree, declare such amount so found first lien against said land in favor of the defendant." R. S. 1881, section 2944; R. S. 1894, section 3364.

"2. In all sales of real estate by an infant, he or she shall not be permitted to disaffirm said sale without first restoring to the person owning the property sold the consideration received in said sale, if said infant falsely represented himself or herself to said purchaser to be over the age of twenty-one years, and the party buying from said infant acted in good faith, and relied upon said representations in such sale, and had good cause to believe said infant of full age." R. S. 1894, section 3365; R. S. 1881, section 2945.

It is contended by the appellees that this statute cannot apply, because it has reference only to conveyances of land; and they contend further, that a mortgage in this State upon real estate constitutes only a lien upon the land mortgaged, vesting in the mortgagee no title therein, the title remaining in the mortgagor until divested by a judicial sale. That is true. *Reasoner, Admr., v. Edmundson*, 5 Ind. 393; *Grable v. McCulloh*, 27 Ind. 472; *Lilly v. Dunn, Admr.*, 96 Ind. 220. But it does not necessarily follow that the Legislature

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did not intend to include mortgages within the operation of the act.

As was said in *Stout v. Board, etc.*, 107 Ind. 343 (347): "It is true, as contended, that in construing a statute the probable intention of the Legislature must be kept constantly in view, and that where the language of the statute is plain and unambiguous, the expressed intention of the Legislature must prevail, there being no room left for construction. *Case v. Wildridge*, 4 Ind. 51; *Buskirk Pr.* 353; *Taylor v. Board, etc.*, 67 Ind. 383; *United States v. Fisher*, 2 Cranch, *358, 399; 1 Kent Comm. pp. 460—468. It is also true that the courts cannot extend the plain meaning of a statute by the substitution or addition of words or phrases without encroaching upon the legislative department of the government. *Trustees, etc., v. Ellis*, 38 Ind. 3. But the legislative intention, as collected from an examination of the whole, as well as the separate parts of a statute, will prevail over the literal import of particular terms, and will control the strict letter where adherence to such strict letter would lead to injustice, to absurdity, or to contradictory provisions. *Mayor, etc., v. Weems*, 5 Ind. 547; *Buskirk Pr.* 353; *Middleton v. Greeson*, 106 Ind. 18; *Miller v. State, ex rel.*, 106 Ind. 415. * * * So in cases of doubt or uncertainty, acts *in pari materia*, passed either before or after, and whether repealed or still in force, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions, and within the reason of the same rule, contemporaneous legislation, not precisely *in pari materia*, may be referred to for the same purpose. *Prather v. Jeffersonville, etc., R. R. Co.*, 52 Ind. 16—32; *Douglass v. Howland*, 24 Wend. 35—45; *Taylor v. Board, etc., supra*; Bishop Written Laws, sections 75, 76. The history of a coun-

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try, its topography, and the general condition are elements which enter into the construction of the laws made to govern it, and these are matters of which the courts will take judicial notice." To the same effect are *Storms v. Stevens*, 104 Ind. 46; *Woods v. State*, 134 Ind. 35; *Lime City, etc., Assn. v. Black*, 136 Ind. 544.

It is said in 1 Jones on Mortgages, that: "At common law the legal estate vested in the mortgagee and was forfeited upon default. Equity established the right of redemption after default. From these principles is derived the doctrine of mortgages as it exists at the present day, in England and in a large part of our own country. The legal title passes to the mortgagee by the deed, but the mortgagor has, after default, a right to redeem, which he may enforce in equity. A mortgage is one thing at law, and another in equity; in the one court it is an estate, and in the other a security only.

The mortgagee has certain legal remedies, and the mortgagor certain equitable remedies. These have been so adjusted that a perfectly defined system is the result. Courts of law and courts of equity mutually recognize the jurisdiction of each other over this subject. Courts of law have so far adopted the principles of equity that they allow the legal title of the holder of the mortgage to be used only for the purpose of securing his equitable rights under it. Courts of equity allow the mortgagee, for the purpose of protecting and enforcing his lien against the mortgagor, the remedies of an owner; he may enter into and hold possession, and take the rents and profits in payment of his mortgage debt, and may have his action of ejectment to recover such possession, and hence is sometimes called the owner. The mortgagee has something more than a mere lien; he has the transfer of the property itself and a legal estate in it, giving him a standing at law, as well as in equity. His

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interest can be called a lien only in a loose and general sense, in contradistinction to an absolute and indefeasible estate. In equity a mortgage of land is regarded as a mere security for a debt or obligation, which is considered as the principal thing, and the mortgage only as the accessory. The legal title vests in the mortgagee merely for the protection of his interest, and in order to give him the full benefit of the security; but for other purposes the mortgage is a mere security for the debt." 1 Jones on Mort., section 11, 4 ed. To the same effect is 15 Am. and Eng. Ency. of Law, 727. Lord Denman, in *Higginbotham v. Barton*, 11 Ad. and El. 307-314, said: "It is very dangerous to attempt to define the precise relation in which the mortgagee and mortgagor stand to each other, in any other terms than those very words;" and Baron Parke, in *Litchfield v. Ready*, 20 L. J. Ex. 51, speaking of the mortgagor, said: "He can be described only by saying, he is mortgagor." And in 1 Jones on Mort., section 16, it is said: "In the same way it may be said that the most accurate and comprehensive definition of a mortgage is that it is a mortgage."

The adoption of equitable principles by courts of law concerning mortgages has been followed by legislative enactments, taking from the mortgagee the right of possession in many of the American States, so that in these States it is the established doctrine that a mortgage confers no title or estate upon the mortgagee, but only a security. 1 Jones on Mort., section 12. As before observed, Indiana is one of the States adopting such legislative enactments. New York took the lead in that direction, and as early as 1828, enacted such a statute. And yet an examination of the cases in that State in which questions in regard to the nature of mortgages are involved and discussed, shows considerable conflict and contradiction of views. This is especially the case

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with the decisions prior to the statute, taking from the mortgagee the right to recover possession of the mortgaged property; and even since that statute, although in theory the legal title remains in the mortgagor until foreclosure, it has been frequently admitted by judges and legal writers that for some purposes, and in some cases his interest must be treated and regarded as a title for the purpose of protecting his equitable rights. 1 Jones on Mort., section 13, and authorities cited. In *Hubbell v. Moulson*, 53 N. Y. 225, S. C. 13 Am. R. 519, the court of appeals said: "But while no title in a strict sense vests in the mortgagee of land until foreclosure, yet this interest is in some cases treated and regarded as a title for the purpose of protecting and enforcing the equities between the parties. An instance of this kind is found in *Mickles v. Townsend*, 18 N. Y. 575, where it was held for the purpose of applying the doctrine of estoppel by deed against a person claiming as assignee of a mortgage, which existed at the time of his prior conveyance of the mortgaged premises with warranty, but which was assigned to him afterwards. And in *Van Duyne v. Thayer*, 19 Wend. 162, the release of the equity of redemption by the mortgagor to the mortgagee was held to enure as an enlargement of the estate of the mortgagee, so as to prevent the plaintiffs from recovering dower at law, in disregard of the equity of the defendant to have the mortgage first satisfied out of the land."

The common law rule as to mortgages was modified by statute in this State at an early period. The present law modifying the common law character and qualities of a mortgage on real estate was enacted in 1852, and composed chapter 6, 1 R. S. 1852, page 239, and was carried forward into the revision of 1881, and composes,

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with subsequent additions and amendments, article 39 of that revision, and also article 39 of Burns R. S. 1894.

The most important change made was, that unless the mortgage especially provide that the mortgagee shall have possession of the mortgaged premises he should not be entitled to the same; that no mortgage thereafter executed shall authorize the mortgagee to sell the mortgaged premises, but that every such sale should be made under a judicial proceeding.

The above mentioned act was approved May 4, 1852, and its title was: "An act concerning mortgages."

There was another act passed at the same session of the Legislature, entitled "An act concerning real property, and the alienation thereof." 1 R. S. 1852, page 232. This act composed chapter 23 of 1 R. S. 1852. This act was carried forward into the revision of 1881, and with certain additions and amendments thereto composes chapter 18 of said revision, under the title "Conveyance of land." R. S. 1881, page 580. (Section 3915 *et seq.*) And it composes chapter 20 of Burns R. S. 1894.

Section 12 of the act, being section 2927, R. S. 1881, and section 3346, Burns R. S. 1894, provides for the form of deeds for the conveyance of land, and section 15 of the act, being section 2930, R. S. 1881, and section 3349, Burns R. S. 1894, provides that: "Any mortgage of lands worded in substance as follows: 'A B mortgages and warrants to C D (here describe the premises), to secure the repayment of (here recite the sum for which the mortgage is granted or the notes or other evidences of debt, or a description thereof, sought to be secured, also the date of the repayment) the said mortgage being dated and duly signed, sealed, and acknowledged by the grantor, shall be deemed and held to be a good and sufficient mortgage to the grantee, his heirs, assigns, executors, and administrators, with warranty

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from the grantor and his legal representatives of perfect title in the grantor and against all previous incumbrances. And if, in the above form, the words 'and warrant' be omitted, the mortgage shall be good, but without warranty." These two sections of the act have never been changed or modified in the slightest particular since their original enactment, and they still stand as the law governing and prescribing the requisites for deeds and mortgages of real estate.

A mortgage as thus prescribed must have been regarded by the Legislature as partaking of the nature of an alienation of real estate, or else the provision quoted was unconstitutional, being legislation upon a subject not expressed in the title of the act in violation of section 19 of article 4 of the State constitution. But the Legislature and this court, as well as every department of the State government, have at all times since its enactment regarded and recognized the provision quoted concerning real estate mortgages as valid and binding legislation under the above mentioned title. This could not be consistently done without recognizing the form of mortgages prescribed as a species of alienation or conveyance of an interest in real estate. The same Legislature that passed both acts already mentioned passed an act approved June 18, 1852, prescribing certain forms of pleading in civil cases, among which forms was No. 9, to foreclose a mortgage, reading as follows: "A B complains of C D, and says that the defendant executed a mortgage conveying to the plaintiff the tract of land therein described as security for the payment of a debt evidenced by a note," etc. Here again was an express recognition by the same Legislature that the statutory mortgage it had provided for still retained enough of the common law characteristics of the mortgage to make it necessary, in a complaint to

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foreclose such mortgage, to allege that the mortgagor in executing it had conveyed to the mortgagee the tract of land therein described as security, etc. The warranty of title and against incumbrances provided for in our statutory mortgage is an express retention of one of the features of a common law mortgage, which is also one of the characteristics of a deed of conveyance making subsequently acquired title by the mortgagor enure to the benefit of the mortgagee, and conferring on the mortgagee the right to sue the mortgagor for breach of covenants of seizin against incumbrances and of warranty, as in an ordinary warranty deed of conveyance. Again, section 16 of the original act, "concerning real property and the alienation thereof," which is section 3350, Burns R. S. 1894, and section 2931, R. S. 1881, and which remains the same precisely as when first enacted in 1852, except the time for recording instruments is shortened from ninety to forty-five days, reads as follows: "Every conveyance or mortgage of lands, or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such lands shall be situated; and *every conveyance or lease*, not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration." Here it will be observed that the first clause in the section provides that deeds, mortgages and leases for more than three years shall be recorded, but makes no provision as to the effect on such instruments to neglect to record them. But the last clause makes provision that every *conveyance or lease*, not so recorded shall be fraudulent and void as against any subsequent purchaser, etc. There is, therefore, no provision that a mortgage not recorded within the specified time shall be void as against

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subsequent purchasers unless mortgages are included in the word conveyance in this clause. And yet this court has always held that mortgages were included within the term conveyance in the clause of the section mentioned by holding that they were void against subsequent purchasers if not recorded within the prescribed time. *Routh, Admr., v. Spencer*, 38 Ind. 393; *Gilchrist v. Gough*, 63 Ind. 576, and authorities there cited.

If it were otherwise, all mortgages unrecorded within the specified time would be good against subsequent *bona fide* purchasers for value. Again, this court has always held that a mortgagee who has taken the mortgage to secure a pre-existing debt in consideration of an extension thereby made of the time of payment, is a purchaser for valuable consideration. *Gilchrist v. Gough, supra*; *Work v. Brayton*, 5 Ind. 396; *Babcock v. Jordan*, 24 Ind. 14; *Wright v Bundy*, 11 Ind. 398; *Busenbarke, Exr., v. Ramey*, 53 Ind. 499.

This could only be so ruled because the mortgage is a species of conveyance. In the last case above cited, Worden, J., in speaking for the court said: "The proposition that the receiving of a conveyance by way of mortgage to secure the payment of a pre-existing debt," etc., and again: "We need not determine what would have been the effect of an absolute conveyance of the property by Ramey and wife to McCune in payment and extinguishment of the debt which Ramey owed Mount. The conveyance was made by way of security only for the old debt," thus recognizing that a mortgage was a species of conveyance. And in *Gilchrist v. Gough, supra*, Howk, J., in speaking for the court, said: "On the 1st day of March, 1869, the defendants * * * executed to the appellants the mortgage described * * * conveying to him the real estate, etc., * * * as security

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for the payment of a debt," etc., again recognizing a mortgage as a species of conveyance.

When the statute we are considering was passed, we had in force the 18th section of the act of descents, providing that if a widow shall marry a second, or other subsequent time, holding real estate in virtue of any previous marriage with a child or children alive by such marriage, she was prohibited from alienating such real estate during such second or subsequent marriage, with or without the assent of her husband. Burns R. S. 1894, section 2641; R. S. 1881, section 2484. It will be observed that the word alienate is used in the section instead of convey.

The word alienate means to convey or transfer. Burrill Law Dic. And yet this court has frequently decided that this inhibition upon alienation, this prohibition against conveying by such widow, of lands descended to her from a former husband, made during a subsequent marriage, also prohibits the making of a mortgage thereon by her, during such subsequent marriage. *Vinnedge v. Shaffer*, 35 Ind. 341; *Bowers, Admr., v. Van Winkle*, 41 Ind. 432; *McCullough v. Davis*, 108 Ind. 292; *Ætna Life Ins. Co. v. Buck*, 108 Ind. 174.

Here is an express recognition and judicial exposition of the meaning of the word "conveyance," or alienation by the highest judicial tribunal in the State, to the effect that such word may and does include and embrace a mortgage of real estate, or rather that a mortgage on real estate is a species of conveyance, though it vests in the mortgagee no title but a mere lien. At least two of these decisions were made before the enactment of the statute we are considering. The Legislature had a right to, and it may be presumed they used the word "conveyance" in the statute in the sense, and with the

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meaning in which they had employed it in former statutes, and in the sense judicially attributed to it by the highest court in the State, prior to the time of its enactment.

It is very evident that the purpose of the act was to provide a remedy against the known evil arising out of the legal right of minors, who have actually reached the estate of manhood and womanhood, to disaffirm their contracts in relation to their real estate, and at the same time retain the consideration received. It was not the purpose or intent to take away any of the protection that minority throws around infants of tender years. But it was the intent of the first section to take away some of the privileges the law of infancy throws around female minors, who are old enough to enter into and become bound by the most important civil contract that can be made by woman or man, and who have entered into such contract by marrying men over twenty-one years of age.

The second section was evidently intended to take away some of the legal privileges from minors, both male and female, who have so nearly reached the estate of manhood or womanhood, that they might honestly be taken for persons of full age by those dealing with them, and who in dealing with such, concerning their real estate falsely represent themselves to be over twenty-one years of age.

The general object of both sections, evidently, was to prevent minors of both classes from using the shield of minority as a sword, to prevent them from perpetrating deeds of rascality and villainy by means of their minority.

The statute was, therefore, highly remedial. Such statutes should be largely and beneficially construed, so as to advance the remedy. *Tousey v. Bell*, 23 Ind. 423;

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Marion, etc., Co. v. Norris, 37 Ind. 424. Such statutes may be construed *ultra*, but not *contra*, the strict letter. *Marion, etc., Co. v. Norris, supra.*

In the absence even of the previous history of the legislation and adjudications in this State, and other States, relative to the import of the term mortgage and the term conveyance, under the statutes referred to, it would seem strange if the Legislature, in enacting the statute under consideration, meant to confine the remedy strictly to deeds of conveyance in the strict sense. They could not look at or think of the frauds and wrongs that such minors had been perpetrating by disaffirming their deeds of conveyance without also thinking of and looking at the frauds and wrongs such minors had been perpetrating, and were liable to continue perpetrating by disaffirming their mortgages, as in this case, after being snugly ensconced in a comfortable dwelling house built on the land mortgaged by the money borrowed from the mortgagee's earnings and savings.

To suppose, in the light of all these considerations, that the Legislature did not intend to extend the remedy provided to mortgages, as well as deeds of conveyance, in the strict sense, is to attribute to it a thoughtless stupidity of a marvelous character; such a supposition would be a reproach to the Legislature and the law.

The principle involved has been directly decided in favor of the appellant on a similar statute by this court, in *Bakes v. Gilbert*, 93 Ind. 70. The statute there involved is the section next preceding the first section under consideration in R. S. 1881, and in Burns R. S. 1894, and is section 3363 of the latter and section 2943 of the former. This statute was approved April 13, 1866, and reads as follows: "Any married woman under the age of twenty-one years, whose husband is of the age of twenty-one years, may join with her hus-

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band in any instrument for the conveyance of the real estate of such husband, under such regulations as are prescribed by law in such cases for married women of the age of twenty-one years; and such conveyance of such infant married woman shall in all respects be as valid as if she were of full age." In the case referred to the appellant, Bakes, sued the appellees, Samuel A. Gilbert and Alice Gilbert, his wife, to foreclose a mortgage on real estate owned by them, executed by them to secure the payment of a note executed by said Samuel.

Among the answers filed by Alice, separately, was her second paragraph, alleging her infancy at the time she executed the mortgage. The trial court overruled a demurrer thereto for want of sufficient facts. The judgment was reversed, with instructions to sustain the demurrer to the answer of infancy, thus holding that a mortgage executed by an infant *feme covert* was binding on her under a statute enabling her to bind herself with her husband, he being twenty-one years of age, "in any instrument for the conveyance of the real estate of such husband." This is a direct adjudication by this court that the term "conveyance of real estate" includes and comprehends mortgages of real estate.

It was said in that case that the plea of infancy would have been good if, in addition to the allegations of infancy, she had alleged that the real estate was her separate property, or that the husband was a minor when the mortgage was executed. That is because the statute only authorizes and enables her to bind herself by joining her husband in a conveyance of her *husband's* land when he is of *full age*. Therefore, both of those facts must exist to bring her within the statute. Therefore, she being an infant, the land being her own, or the land being his, and he under age, she cannot bind herself under the statute. But the presence of these alle-

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gations could not make the answer of infancy good unless the term "conveyance," used in the statute, comprehends and embraces mortgages on real estate. But when this court reversed the judgment, remanding the cause, with instructions to sustain the demurrer to the answer of infancy, it was necessarily adjudged that a mortgage on real estate was embraced and comprehended within the term "conveyance," as used in that statute; because the complaint to which the answer of infancy was addressed counted on a mortgage, and if a mortgage is not a species of conveyance, nor comprehended within that term, infancy was a good answer, whether the land belonged to him or her, and whether he was twenty-one years of age or not when it was executed. Therefore, if the term conveyance, as used in the statute, did not comprehend and embrace mortgages on real estate, the trial court rightly held the plea of infancy good, and this court wrongly held it bad in remanding with instructions to sustain the demurrer thereto. But by adjudging it bad, and instructing the trial court to sustain the demurrer thereto, it was, as before observed, adjudged that mortgages are embraced and comprehended in the term "conveyance," as used in the statute, and that mortgages of real estate are a species of conveyance.

That adjudication is decisive of the principle involved in this case in favor of the appellant and against the appellee, Lotta B. Harris, and requires a reversal of the judgment as to her unless that case is overruled.

That case cannot be overruled so as to escape its controlling influence on the case before us, because it was the rule of law declared by the highest court in the State, at the time the contract sued on in this case was executed. It must control the decision of that question in the case before us, right or wrong. *Haskett v. Maxey*, 134 Ind.

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182; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331. But the conclusion from the foregoing consideration is irresistible that that decision is right and ought to be adhered to.

It follows from what we have said that the circuit court erred in overruling the demurrer to the separate answer of the appellee Lotta B. Harris, and in sustaining the demurrer of said appellee to appellant's reply to her separate answer, and sustaining the demurrer to the answer of appellant to the separate counterclaim of appellee Lotta B. Harris. The conclusion reached makes the cross-error assigned wholly immaterial as such alleged errors cannot again arise.

The judgment is reversed and the cause remanded with instructions to sustain the demurrer to the separate answer of Lotta B. Harris, to overrule her demurrer to appellant's reply to her separate answer, overrule the demurrer to the answer of appellant to the separate counterclaim of said appellee, and for further proceedings not inconsistent with this opinion.

MONKS, J., did not participate in this decision.

Filed June 4, 1895.

ON PETITION FOR REHEARING.

MCCABE, J.—The appellees have filed a petition for a rehearing on the sole ground that we erred in unintentionally holding in effect that the appellee Lotta B. Harris could not disaffirm the note or bond secured by the mortgage. That is a separate contract from the mortgage. The mortgage contains an agreement to pay the debt separate and apart from the note or bond. We only intended to hold that she could not disaffirm the mortgage without restoring the consideration, and did not intend to hold that she could not disaffirm the note or bond secured thereby without such restoration. In case she

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disaffirms the note or bond the remedy of the mortgagees must be confined to the real estate mortgaged. Burns R. S. 1894, sections 1100, 1110 ; (R. S. 1881, sections 1087, 1096.) Where there is a separate contract to pay the money secured by the mortgage, a personal judgment may be rendered against the mortgagor, to be levied of his general property in case the mortgaged land proves insufficient to pay the debt. Burns R. S. 1894, section 1111 ; R. S. 1881, section 1097. The statute in question only took away the right to disaffirm such mortgage without restoring the consideration. It left her right to disaffirm the contract, whether evidenced by the bond or note, or by a promise expressed in the mortgage, just as it was at common law, and by that law she had a right to disaffirm that contract, and thus avoid a personal judgment collectible outside of the mortgage. The answer of Lotta B. Harris, setting up her infancy as a full defense to both note and mortgage, was not good on demurrer, because it purported to be a full defense to both note and mortgage, whereas it was only a defense to a part of the cause of action, namely, the note or bond. Her counterclaim, or cross-complaint, counted on and set up the same facts as those stated in her answer, and asked a judgment or decree cancelling or declaring void both note and mortgage. This pleading was in the nature of a complaint, and must be tested by different principles from those governing an answer. The facts stated in the answer must be sufficient to bar the whole cause of action if it is pleaded in bar of the whole.

On the other hand, a complaint is sufficient to withstand a demurrer, if the facts stated therein show that the plaintiff is entitled to any of the relief demanded. The appellant's answer to this counterclaim was that the note and mortgage were given for borrowed money which

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she had not restored, and that her husband was of full age at the time. This, as we before held, was a good answer to a part of the cross-complaint, but not to all. It was a good answer to that part of the counterclaim seeking a cancellation of the mortgage, but was not a good answer to that part seeking the cancellation of the note or bond.

Therefore, the mandate is modified to read as follows: The judgment is reversed, and the cause remanded with instructions to sustain the demurrer to the separate answer of Lotta B. Harris, to overrule her demurrer to appellant's reply to her separate answer, and to grant leave to amend the answer of the appellant to the separate counterclaim of said Lotta B. Harris, so as to make it a partial answer, or an answer to so much of her counterclaim as seeks to avoid and cancel only the mortgage. In case it be so amended, the demurrer thereto should be overruled for further proceedings not inconsistent with this opinion.

The petition for a rehearing is overruled.

Filed October 10, 1895.

No. 17,441.

PFAFFENBACK v. THE LAKE SHORE AND MICHIGAN
SOUTHERN RAILWAY CO.

RAILROAD.—*Evidence.*—*Passenger Ticket, System of Issuing and Selling.*—*Number.*—*Date.*—Evidence that defendant railway company, which was sued for personal injuries alleged to have been received on a specified train, had a system of issuing and selling tickets by consecutive numbers, of stamping thereon the dates of their sale, and for the return and preservation of tickets canceled by conductors, and that the tickets returned as sold at the place where plaintiff's ticket was bought and dated on the day in question were

142	246
148	550
151	661

142	246
163	494

142	246
168	478

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taken up by other conductors than the one with whom plaintiff claimed to have ridden—is admissible to show that he was not on such train.

NEW TRIAL.—*Cause For.*—*Evidence as Upon Discovery.*—*Medical Examination.*—*Order of Court.*—Alleged errors in requiring plaintiff to give testimony before the trial as upon discovery, and to submit to a medical examination out of court before the trial, are not “errors of law occurring at the trial,” which may be presented on motion for a new trial.

SAME.—*Newly Discovered Evidence.*—“*Faulty Memory.*”—A new trial for newly discovered evidence is properly refused, where the only excuse for failing to obtain such evidence on the trial was the applicant’s faulty memory.

INSTRUCTION TO JURY.—*Railroad.*—*Passenger.*—*Necessary Proof.*—An instruction requiring it to appear by a fair preponderance of the evidence, that plaintiff was a passenger, and not a trespasser, on defendant’s train, to entitle him to recover, is proper, where the pleadings make such theory possible, if he was upon defendant’s train, and the evidence shows that he was not seen by the conductor and other trainmen who would have had opportunities to see him if he had been openly on the train.

SAME.—*Rejected Offer to Prove.*—An instruction that the jury should not consider as evidence mere offers to make proof, which offers are rejected, is properly refused.

SAME.—*As to Consideration of Evidence by Jury.*—An instruction that the burden of proof is upon plaintiff to establish his cause of action by a preponderance of the evidence, and that in determining on which side the preponderance lies, the jury may consider the conduct and demeanor of the witnesses, their opportunities for knowing, their interest or lack of interest in view of all the “other evidence, facts and circumstances” proved on the trial; and from all these “circumstances” determine where the preponderance lies—is not misleading as limiting their inquiry to the “circumstances.”

From the St. Joseph Circuit Court.

H. C. Dodge and J. A. Hibberd, for appellant.

G. C. Greene, O. G. G. Danner, F. E. Baker and C. W. Miller, for appellee.

HACKNEY, J.—The appellant sued the appellee, claiming damages for personal injuries alleged to have been received by him while a passenger upon the appellee’s train, and from the appellee’s negligence in permitting said train to collide with another train standing upon an

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open switch. Upon a trial by jury, there was a verdict for the appellee. The only error assigned in this court is the action of the trial court in overruling the appellant's motion for a new trial. There are eight alleged errors discussed: 1. The sufficiency of the evidence to sustain the verdict. 2. Ordering the appellant to give testimony prior to the trial, as upon discovery. 3. Requiring the appellant to submit to a medical examination out of court, and before the trial. 4. Refusal of an instruction to disregard evidence offered and excluded. 5 and 6. Instructions given. 7. Newly discovered evidence. 8. Admitting evidence of the manner in which the appellee charged its tickets to local offices, the registry of numbers, the report of sales by numbers, the return and preservation of used tickets, etc.

The appellant's evidence, that he was a passenger on the occasion of the collision, was practically but his own unsupported testimony, while the appellee sought to contradict this by the evidence of several, who were on board the train, were well acquainted with the appellant, and had opportunities to have seen him if on board, that they did not see him. There were contradictions as to the number of persons in the coach in which he claimed to have been, and there was evidence that the only tickets sold from his station to Chicago, his destination, and return, were punched and taken up by conductors other than Harris, who was in charge of the train upon which appellant claimed to have been a passenger. There was evidence impeaching and supporting the appellant's character, and there were various circumstances as to delay in suing, and as to withholding the knowledge of his injuries, etc. It will be seen, therefore, that the case, upon the evidence, was one peculiarly for the jury, and that we cannot reconsider it.

The second and third alleged errors could not have

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been “errors of law occurring at the trial,” and were, therefore, not presentable upon motion for a new trial. *City of New Albany v. White*, 100 Ind. 206; *Cates v. Thayer*, 93 Ind. 156; *Reed v. Spayde*, 56 Ind. 394. As said in the last cited case: “It is obvious that a new trial would not correct such an error; for after a new trial was granted, the error would stand in the record the same as before.”

The appellant’s instruction numbered one, which was refused by the court, was to the effect that the jury should not consider as evidence mere offers to make proof, such offers having been rejected. The question here presented is like that in *Grand Rapids etc., R. R. Co. v. Horn*, 41 Ind. 479, where the trial court refused to charge that “the jury should, without regard to the parties, look alone at the evidence, and render such a verdict as, in their judgment, the evidence may require, without prejudice, partiality or favor.” Of that charge this court said: “There are some things that must be taken as true in judicial as well as other investigations. We think it fair to presume that jurors in any part of the State of Indiana are sufficiently intelligent to know that their duty, when sworn as such, requires them to decide the case according to the evidence, and without prejudice, partiality, or favor, and that the court cannot be said to have committed an error in not reminding them of that duty.” To have been obliged to charge as requested, would have been equivalent to a requirement that the court should have reminded the jurors that they had been sworn to render their verdict according to the evidence. Instructions are designed to advise the jurors of the law of such issues as are presented by the pleadings, and are not to admonish them that they should not violate their oaths.

The court’s third instruction was, that “these aver-

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ments and denials present the issue which you are to determine from the evidence. The averments of the complaint are affirmative allegations, and the law imposes upon the plaintiff the necessity of proving them by a fair preponderance of the evidence before he can recover, and in determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the results of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial, and, from all these circumstances, determine upon which side is the weight or preponderance of the evidence." Counsel for the appellant say: "This instruction is misleading. From the context of the whole instruction, it is clear that the average juror had excluded from his mind the necessity of employing the 'evidence' and 'facts' as a means of determining upon which side the weight or preponderance of the evidence was, and that they were restricted to a consideration of the 'circumstances' as being the basis upon which they should determine upon which side was the weight or preponderance of the evidence, and were not to weigh the evidence and facts as well as the circumstances in coming to that conclusion." This objection, if we comprehend it, is that the court denied the jury the right to consider the "evidence and facts," in determining which side had presented a preponderance of the evidence, and that such inquiry was limited to the "circumstances." As we understand the instruction, the objection made is not tenable. It combines the two rules, that the burden rests upon the plaintiff to establish his cause of action by a preponderance of the

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evidence (not of the circumstances), and in ascertaining where the preponderance of the evidence (not circumstances) lies, the jury should pass upon the credibility of the witnesses, considering the tests given, "in view of all the other *evidence, facts, and circumstances proved* on the trial, and, from all these circumstances, determine upon which side is the weight or preponderance of the *evidence*" (not circumstances.) There is no affirmative limitation upon the duty of the jury to consider the evidence, in considering the two rules mentioned. Nor is there implied, from the phrase "from all these circumstances," that the evidence should not supply a proper basis of consideration. "Circumstance" is defined as "An event; a fact; a particular incident." See Webster's International Dictionary. The word does not imply that events, facts and incidents arise outside of the evidence and disconnected from the trial.

The fifth instruction given, and of which the appellant complains, is as follows: "In order to entitle the plaintiff to recover in this action, it must appear, by a fair preponderance of the evidence, that he was, at the time of the injury, if any, a passenger on defendant's train of cars, and not a trespasser. If he was a trespasser, he cannot recover, and you should find for the defendant."

It is urged that this charge is not within any theory of the case. On the pleadings the appellee's denial made possible the theory that, if appellant was upon the train, he was a trespasser, and not a passenger. From what we have said of the evidence, it will be seen that if appellant was upon train without a ticket, and without having been seen by the conductor and other trainmen, who had opportunities to have seen and to have known him, if in the coach, and not in hiding, the theory that his injury, if any, arose while a trespasser, was possible upon the evi-

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dence. This view is, of course, the most favorable construction which the jury could have given the evidence from the appellee's standpoint, and this view (the burden resting upon the appellant to make the error manifest) we are required to accept.

The next proposition is that arising out of the refusal of a new trial upon the alleged newly discovered evidence. At the trial it was an issue of first importance as to whether, on the evening of December 6, 1889, the appellant had purchased a ticket for Chicago, and had taken the appellee's train for that city from the city of South Bend. It was also important, as a corroborative fact, that the appellant was upon a returning train on December 7, 1889, and, further, that he was ill when he returned to his home on that day. These facts, or supposed facts, were within the appellant's knowledge, and he gave testimony upon them. His alleged newly discovered evidence is from one who on and after the 6th day of December, 1889, was employed by, and lived at the house of, the appellant; one who, as appellant now remembers, had walked with, and remained in the company of, the appellant to appellee's station, on the occasion of the alleged purchase of the ticket, and saw him procure the ticket and depart upon the train; one who observed him upon the returning train, and who saw that appellant was ill when he returned to his home, and knows that he remained in his bed for three days.

That the appellant did not produce, at the trial, a witness so important, cannot be due to any other cause than forgetfulness, if the alleged evidence is true. Here was an inmate of his own household, at the time in question, a person who accompanied appellant in the most important transaction connected with the trip, and met him and attended him upon his return. The first and most natural source of information, and yet the

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discovery is not made until after verdict. It does not appear that inquiry was made of this witness, and no excuse is offered for the failure to do so, excepting a faulty memory. That one forgets that which it is his duty to remember, cannot be offered to excuse neglecting that duty, is manifest. In motions of this kind, such diligence must be shown as will "strongly, clearly, and satisfactorily" excuse the failure to bring forward the evidence upon the trial. *Morrison v. Carey*, 129 Ind. 277, and cases there cited. Such diligence was not shown by the appellant.

Finally it is insisted that the trial court erred in permitting the appellee's auditor to testify to the system of issuing and selling tickets by consecutive numbers, of stamping upon them the dates of their sales, and of the return and preservation of tickets used and cancelled by conductors, and that the tickets returned as sold and dated on the day in question, were not taken up by the conductor with whom the appellant claimed to have ridden, but by others.

The importance and value of this evidence will be seen by an illustration: Suppose that tickets from South Bend to Chicago and return, numbered 1, 2, 3, 4, and 5, are sent to the South Bend agent. In the course of the company's business the five tickets are returned to the auditor, with the dates of sales stamped upon them, and bearing the peculiar punch marks of the conductors who received them. Suppose that the only tickets stamped of the date of December 6, 1889, came back to the auditor and took their places in the consecutive numbers, and that one of them contained the punch mark of the conductor with whom the appellant claimed to have ridden. Would not such facts corroborate and lend strength to the appellant's claim that he was a passenger upon that particular train? Most manifestly.

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And, if the returned tickets, all in proper order, had shown that they were punched by conductors who were in charge of trains, other than the train upon which the appellant claimed to have been a passenger, the circumstance would have been as strong in favor of the appellee's theory, that appellant was not a passenger upon the particular train. The principal objections to the evidence, in the circuit court, were that it was hearsay and was irrelevant. We think that the evidence was competent, especially when taken in connection with the tickets produced.

We find no error for which the judgment should be reversed, and it is therefore affirmed.

Filed October 10, 1895.

No. 17,660.

CITIZENS STREET RAILROAD CO. v. HAUGH.

142	254
151	145

142	254
133	541

142	254
160	453
160	454

SUPERIOR COURT.—*Appeal from General to Special Term Abolished.*

—*Constitutional Law.*—A statute abolishing appeals from the special to the general terms of the superior courts which were created by statute, and making proper provision for pending cases, is not unconstitutional.

STATUTE.—*Clerical Error.—Date of Approval of Act*—A clerical error in stating in an amendatory act the date on which the amended act was approved, the title of which is given in full, and the date of approval of which is correctly given in the body of the act, does not render the amendatory act unconstitutional under Const. Art. 4, section 19, requiring every act to embrace but one subject, which shall be expressed in the title.

From the Marion Superior Court.

Mason & Latta, for appellant.

Ayres & Jones, for appellee.

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MONKS, J.—The only question presented in this case is as to the constitutionality of the following act of the general assembly of 1895 :

“An act to amend section 399, and to repeal sections 400 and 401 of an act entitled ‘An act concerning proceedings in civil cases,’ approved April 7, 1891, and declaring an emergency.

[Approved March 11, 1895].

“Section 1. Be it enacted by the General Assembly of the State of Indiana, that section 399 of the above entitled act, and being section 1360 of the Revised Statutes of 1881, be amended so as to read as follows :

“Section 399. In all cases where under existing or future laws of this State in like circumstances, a person has the right of appeal from the circuit to the Supreme or Appellate court, an appeal may be taken direct to the Supreme or Appellate court from any order or judgment of either a special or general term of the superior court, and such appeals shall be governed in all things by the law regulating appeals from the circuit court to the Supreme or Appellate court. Appeals from the special to the general term are hereby abolished. In all cases where appeals are now pending [in] the general term of any superior court in this State, any party shall have the right to perfect an appeal from the order or judgment of the special term to the Supreme or Appellate court at any time within ninety (90) days after the passage of this act: *Provided, however,* that this provision shall not be so construed as to reduce the time in which an appeal may be taken to less than one year from the date of the order or judgment appealed from.

“Sec. 2. Sections 400 and 401 of the above amended act, and being sections No[s]. 1361 and 1362 of the Revised Statutes of 1881, are hereby repealed.

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“Sec. 3. An emergency is hereby declared to exist for the immediate taking effect of this act, and the same shall be in force from and after its passage.” Acts 1895, p. 256.

If said act is constitutional, this case is to be affirmed, if not, it is to be reversed.

The first objection urged is that no act bearing the title “An Act concerning proceedings in civil cases” was ever passed by the Legislature of 1891, and for that reason alone the act to be amended is not identified as required by the constitution.

Section 19 of article 4 of the constitution provides that “Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title.” Section 115, R. S. 1881, section 115, R. S. 1894. Section 21 of the same article provides that “No act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length.” Section 117, R. S. 1881, section 117, R. S. 1894.

It has been uniformly held by this court, that it was intended by these sections that in an amendment of a section or revision of an act two things were required:

First. The title of the act to be amended should be referred to by setting it out.

Second. The act revised or section amended should be set forth and published at full length.

When the act to be amended is identified in the manner required by the constitution, and it is not certain what act was intended to be amended on account of two or more acts having the same title, or for any other cause, then the court will resort to means other than the title to determine what act was intended.

But if the act attempted to be amended is not designated in the manner required by the constitution, the court

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cannot resort to other means of identification although such other means would point out the act intended beyond any question. *Feibleman v. State, ex rel.*, 98 Ind. 516; *Board, etc., v. Smith*, 52 Ind. 420; *State, ex rel., v. Harrison*, 67 Ind. 71; *Hall v. Craig*, 125 Ind. 523 (529); *Boring, Aud., v. State, ex rel.*, 141 Ind. 640. Courts are bound to ascertain and give effect to the legislative intention only when expressed as the constitution requires. Neither the courts nor the Legislature can disregard the commands of the constitution.

It is true, as claimed by appellant, that no such act was passed by the Legislature of 1891, but the courts take judicial notice that an act with this title was passed by the Legislature of 1881, and approved April 7, 1881, and that the same was the only act with such a title in force when the act in question was adopted. *Shoemaker v. Smith*, 37 Ind. 122 (131).

An examination of the act of 1881 discloses the fact that there are sections 399, 400 and 401, being sections 1360, 1361 and 1362, R. S. 1881, in said act, and that they provide for appeals from a special to the general term of superior courts.

The date of the approval of an act is no part of its title, and an act may be amended without giving or referring to the date of its approval. The constitution does not require that the date of the approval of the amended act be given in the title or body of the amendatory act. *Shoemaker v. Smith, supra*.

The act in question fully conforms to all the requirements of sections 19 and 21, of article 4, of the constitution.

The amended and amendatory acts have proper titles as required by said section 19, *supra*. The title of the amendatory act refers to the title of the act amended by setting it out in full, and declares that it is an act to

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amend section 399 and repeal sections 400 and 401 of said act, and the section amended is set forth and published at full length.

It is clear, therefore, that the act as well as the sections to be amended and repealed is identified in the manner required by the constitution.

The title and body of the act show beyond question what particular act as well as what sections of said act was intended to be amended and repealed, while the rule is that no law is to be held unconstitutional if it is a doubtful question. To doubt is to resolve in favor of the constitutionality of the law. *Bush v. City of Indianapolis*, 120 Ind. 476; *Henderson v. State, ex rel.*, 137 Ind. 552 (556) (24 L. R. A. 469).

The date 1891 in the title of the act in question is clearly a clerical error as shown by the title and body of the act when compared with the act amended, and can therefore have no controlling influence in the determination of this case.

It is next urged that "said act is void for the reason that it deprives a co-ordinate branch of the State government of the power of exercising a jurisdiction which the Legislature had previously conferred and which had been assumed by the court."

The superior courts are created by statute and not by the constitution. They have only such jurisdiction as the statute gives. The power that creates them may abolish them or change their jurisdiction, and if the law which abolishes the court or changes its jurisdiction makes proper provision for pending cases by transfer to some other court or commencing a new action so as not to interfere with vested rights or deprive the parties of any remedy, no objection can be made to the same. The act in question makes ample provision for all cases pending on appeal in the general term of the superior

State, *ex rel.* Gowen *et al.*, *v.* Jackson *et al.*

courts, so that no party to such cases was deprived of an appeal from the trial court. What effect, if any, the omission of this provision would have had on the act, we need not and do not determine. The act is clearly constitutional.

Judgment affirmed.

Filed October 10, 1895.

No. 17,187.

STATE, EX REL. GOWEN ET AL., *v.* JACKSON ET AL.

PLEADING.—*Filing Amended Pleading.*—*Waiver.*—The filing of an amended pleading waives any error committed in rulings upon such pleading.

From the Lawrence Circuit Court.

Duncan & Batman and *J. A. Zaring*, for appellants.

HACKNEY, J.—The appellants were plaintiffs in the suit below, and after the trial court had sustained the demurrer to their complaint, they filed an amended complaint, upon which further proceedings were had. The only ruling of the circuit court assigned here as error is that above mentioned. The filing of an amended pleading not only takes from the record the original pleading, but waives any error which may have been committed in rulings upon such pleading. *Johnson v. Conklin*, 119 Ind. 109; *Kennedy v. Anderson*, 98 Ind. 151; *Conley v. Dibber*, 91 Ind. 413; *State, ex rel., v. Hay*, 88 Ind. 274; *Berghoff v. McDonald*, 87 Ind. 549; *Eshelman v. Snyder*, 82 Ind. 498; *Miles v. Buchanan*, 36 Ind. 490; *Earp v. Commissioners, etc.*, 36 Ind. 470;

142	259
145	644
147	806
142	259
152	555
142	259
164	215

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Aiken v. Bruen, 21 Ind. 137 ; *Patrick v. Jones*, 21 Ind. 249 ; *Elliott App. Proced.* 595, 683 ; *Gowen v. Gilson*, 142 Ind. 328, at this term.

The record presents no error, and the judgment of the lower court is affirmed.

Filed October 11, 1895.

No. 17,232.

WILKINS v. HYDE ET AL.

LIBEL.—*Petition by Board of Children's Guardians for Custody of Child.—Privileged Act.*—A petition under section 3189, R. S., 1894, authorizing the board of children's guardians to file a petition, whenever they have probable cause to believe that the parents of any child less than fifteen years old are of "low and gross debauchery," is privileged and cannot be made the basis of a libel suit. (See note at end of opinion)

From the Marion Circuit Court.

Julian & Julian, for appellant.

JORDAN, J.—Appellant instituted this action against the appellees to recover the sum of five thousand dollars as damages for an alleged libel.

The court sustained a demurrer to the complaint, and appellant electing to stand upon her said pleading, judgment was thereupon rendered against her for costs. By her assignment of error, she calls in question the ruling of the court upon the demurrer. A brief summary of the facts is that the appellees are members of, and constitute, the board of children's guardians of Marion county. On the 25th day of June, 1891, as members of this board, they filed their petition in the Marion Circuit Court for the purpose of obtaining the custody of appellant's children. The alleged libel is based upon

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the following words and matter, written and embraced in said petition, to-wit: "That she (appellant therein named) neglects her children and leads a life of low and gross debauchery, and the associations of said children are such as tend to their corruption and contamination." It is averred that the defendants by these words meant to and did charge that the plaintiff was destitute of virtue, and, in fact, a common "prostitute."

The board of childrens' guardians is created by an act of the Legislature, approved March 9, 1889 (Acts 1889, p. 261). Section 3 of this act as amended, and in force March 9, 1891 (section 3189, R. S. 1894), provides that whenever this board shall have probable cause to believe that any child under fifteen years of age is abandoned, neglected or cruelly treated by its parent or parents, or that the latter are of low and gross debauchery, etc., such board shall file its petition in the circuit court setting forth such facts. It is further provided therein that notice shall be given to said parent or parents of the filing of the petition, and upon the hearing thereof by the court, if the facts are found to be true, the custody of the children in question shall be committed to said board. It is well settled, by many authorities, that there are occasions upon which words may be spoken or written of a person, whereby the implication of malice, which ordinarily arises from the words themselves, is destroyed. Among this privileged class or occasion is a proceeding in due course of law. No actual malice is shown in the complaint, but it appears that the words were written and published in a petition expressly authorized by statute, to be filed in a proceeding in court, and that the alleged libelous words were but the statutory grounds, which if found to exist, would warrant the court, under this statute, to award the custody of appellant's children to said board. It is

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obvious, therefore, that appellant's alleged cause of action arose out of a proceeding in court in a matter expressly sanctioned by the statutes of the State, and comes broadly within the rule to which we have referred.

The reason upon which the rule is founded is the necessity of preserving the due administration of justice. As to whether the charge be true or false, or whether it be sufficient or not to effect the object in view, if it be made in the due course of a judicial or legal proceeding, it is privileged and cannot be made the basis of an action for defamation of character. *Hartsock v. Reddick*, 6 Blackf. 255, 38 Am. Dec. 141; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330, and authorities cited in note to this last case; *Strauss v. Meyer*, 48 Ill. 385.

If the contention of the appellant could be sustained, the purpose of the statute providing for the change of the custody of the children of dissolute parents would be virtually destroyed, as the members of the board would be slow to act if every unsuccessful prosecution of a petition filed would subject them to an action for damages. The complaint did not state a cause of action, and the demurrer thereto was properly sustained.

Judgment affirmed.

Filed October 11, 1895.

NOTE.—The authorities on the question whether or not defamatory words in a pleading will sustain an action of libel are found in a note to *Randall v. Hamilton* (La.), 22 L. R. A. 649.

Ayres v. Armstrong et al.

No. 17,538.

AYRES *v.* ARMSTRONG ET AL.BILL OF EXCEPTIONS.—*Signed by Judge after Time Fixed for Filing.*

—*Indorsement.*—A bill of exceptions signed by the judge after the expiration of the time fixed for filing it cannot be considered, although there is an indorsement thereon by the judge that it was presented on a specified day within the time fixed.

SAME.—*Time of Filing.*—The bill, to become a part of the record, must be filed after it has been signed by the judge and not before.

From the Huntington Circuit Court.

T. L. Lucas, for appellant.

J. Q. Cline and *C. W. Watkins*, for appellees.

MONKS, J.—This was an appeal from a survey of real estate. The cause was tried, the court found against appellant and, over a motion for a new trial, rendered judgment on the finding.

The only error assigned is that the court erred in overruling the appellant's motion for a new trial.

The correctness of the court's ruling on the motion for a new trial depends entirely upon the evidence. The motion for a new trial was overruled June 26, 1893, and ninety days given in which to file a bill of exceptions. A bill of exceptions, purporting to contain all the evidence given in the cause, was signed by the judge on the 24th of October, 1893, long after the expiration of the ninety days given. There is an indorsement on the bill of exceptions, signed by the judge, stating that the same was presented to him September 16, 1893; this, however, is no part of the record. *Cornell v. Hallett*, 140 Ind. 634, and cases cited. The statute expressly requires that the date of presentation be stated in the bill of exceptions, not on its back or margin. It

142	263
142	679
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143	210
143	579

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144	192
145	217
146	234

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149	559
149	593
151	331
152	491

142	263
153	549

142	263
156	104
156	376
156	479

142	263
161	371
161	392

142	263
168	50

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has been uniformly held that when the date of presentation is not stated in the bill of exceptions, we must consider the date when the bill was signed as the date of its presentation. *Cornell v. Hallett, supra*, and cases cited. A bill of exceptions, even if presented and signed within the time given, is no part of the record until it is filed. Elliott App. Proced., section 805, and cases cited. Such filing must be after the bill is signed by the judge. *Guirl v. Gillett*, 124 Ind. 501. The record does not show that the bill of exceptions was filed.

It is true that it is stated in the record that the bill of exceptions was filed September 28, 1893, but not being at that time signed by the judge, it was not a bill of exceptions, and did not thereby become a part of the record. *Guirl v. Gillett, supra*.

It is clear, for the reason stated, that what purports to be a bill of exceptions, is not part of the record. No question is therefore presented as to the action of the court in overruling the motion for a new trial.

Judgment affirmed.

Filed October 11, 1895.

 No. 17,206.

EVANS v. THE PITTSBURGH, CINCINNATI, CHICAGO &
ST. LOUIS RAILWAY COMPANY.

RAILROAD.—*Complaint.—Insufficient Allegation.—Personal Injury.—*

A complaint alleging that a brakeman saw plaintiff in a perilous position in front of a moving train, and immediately "signalled the engineer to stop the train, and took off his hat and swung it and halloed at him," is insufficient to show that the engineer knew that any one was in danger.

SAME.—*Personal Injury.—Liability.—Placing Foot on Rail in Front of Wheel.—*A railroad company is not liable for an injury to one

142	264
146	436

142	264
151	362

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who negligently places his foot on a railroad track a short distance from a train, unless its employes who properly started such cars, in the exercise of their duty, knew of his danger and could have stopped the train in time to avoid the injury.

From the Henry Circuit Court.

J. M. Morris, J. Brown and W. Brown, for appellant.

L. P. Newby and J. L. Rupe, for appellee.

HOWARD, C. J.—A demurrer for want of facts was sustained to appellant's complaint.

The pertinent allegations of the complaint are, "That the defendant, by its servants and employes, ran a locomotive and train of freight cars into the town of Ashland, and there stopped and disconnected the locomotive from the train of cars standing upon its railroad track opposite the platform of its depot, and ran said locomotive on ahead, a distance of twenty rods, for the purpose, as the plaintiff supposed, of passing a switch and backing the said locomotive from thence on to a side track for the purpose of gathering some cars and connecting them with its train by bringing them on to the main track and backing them to the said train of cars so left standing upon said main track; that the caboose of said train of cars was the last car in the rear of said train, and that there was in front of said caboose, and connected therewith, what is known as a "scale tester," which was a small heavy iron structure placed upon four wheels, no wider than the track of the railroad, with a round iron covering over the top, which said scale tester was made and used for the purpose of running onto scale platforms, and testing the accuracy of the scales; that whilst said defendant's cars were so standing upon said track, the plaintiff had occasion to pass by the caboose, and being attracted by the sight of the scale

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tester, walked up and placed one hand upon the end of the caboose, and placed his left foot upon the rail in front of the caboose, and in the rear of the scale tester, and stooped over to see under and look at the scale tester, and whilst in this condition the servants and employes of said railroad company, without having run off onto the switch, as they intended to do, carelessly and negligently, and without any warning or signal, ran said locomotive back against the train of cars, so standing upon said track, and butted and pushed them back a distance of one hundred feet; that the plaintiff had on his left foot a heavy boot with a thick sole, and that the wheel of the scale tester ran against his foot, and caught him fast and threw him down, or nearly so, and he caught with his hands, held to some attachment to the caboose car, and held his body up off the railroad track, and that the wheel of the scale tester, when it struck his foot, slid upon the iron rail, holding his foot fast to said rail, and slid him in that condition fifty or sixty feet, said train going slowly all of said time; that whilst he was in this condition, some of the bystanders came to his rescue and aided him in holding his body off said railroad track; that whilst he was in this condition, he hallooed and made such efforts as he could to cause the employes of said defendant to stop the continuous backing of said train of cars; that a brakeman belonging to the crew of defendant's servants, so managing said train, saw the plaintiff in said perilous position, and immediately signaled the engineer to stop the train, and took off his hat and swung it, and hallooed at him and notified him of the great necessity of at once stopping said train, and of the impending danger to the plaintiff, and of continuing to back said train, but the engineer, conductor and other servants having charge and control of said train of cars, and with knowledge of

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the perilous position of the plaintiff, disregarding said warnings, hallooing and violent motions, carelessly and recklessly continued to back said train of cars, by pushing the same with said locomotive, insomuch that the wheels of said scale tester, by its continuous pushing and sliding the plaintiff's foot upon the iron rail, crushed and ground the same, and crushed and ground the bones of his foot into a shapeless mass, and thereby rendered the plaintiff a cripple for life; * * * that after the engineer who was backing said locomotive against said train of cars had notice of the perilous position of the plaintiff, if he had heeded the warnings thereof, could have stopped said train of cars within four feet from where plaintiff's foot was caught, and before his foot had received any serious injury."

It is admitted that the facts alleged show contributory negligence on the part of appellant in placing his foot upon the rail, and near the wheel of the scale tester. It is also admitted that he was a trespasser.

It remains, therefore, to determine whether the appellee wantonly and wilfully caused the injury complained of. The question is not free from difficulty. There are general statements made in the complaint from which such wanton and wilful conduct might be inferred. We must, however, look to the particular facts and circumstances alleged, rather than to the conclusions drawn therefrom by the pleader.

If appellee's employes in charge of the train knew of appellant's peril, and could have stopped the cars before they crushed his foot, the appellee must be held liable. If they did not know of such peril, or, knowing it, could not stop the train in time to avoid the result, the appellee should not be charged with the injury.

Certainly the employes were not to blame when they "ran said locomotive back against the train of cars, so

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standing upon said track, and butted and pushed them back a distance of one hundred feet." It was the business in which the employes were then engaged, and which it was their duty to perform.

It was not until after the locomotive had been thus butted against the cars, that those in control of the train were signaled to stop it. This signaling was done by a brakeman who "saw the plaintiff in said perilous position, and immediately signaled the engineer to stop the train, and took off his hat and swung it, and hallooed at him." This, we think, comes far from showing that the engineer knew that any one was in peril. The fact that the brakeman swung his hat and hallooed at the engineer, rather indicates that the brakeman could not, and therefore did not, give the engineer any definite information of what the trouble was, or why the train should be stopped. The allegations as to these "warnings, halloos, and violent motions," at least fail to show that the engineer, with knowledge of what he was doing, was wantonly and wilfully engaged in endangering the life or limb of the appellant.

But is there anything alleged to show that the engineer could have stopped the train in time to have saved appellant from injury? The engineer, as we have seen, was not to blame for bumping the locomotive against the cars. But this bumping pushed the cars back a hundred feet. The wheel of the scale tester, however, as we learn from the complaint, when it struck the foot of appellant, "slid upon the iron rail, holding his foot fast to said rail, and slid him in that condition fifty or sixty feet." It was this "pushing and sliding the plaintiff's foot upon the iron rail" which crushed the foot, as is further stated in the complaint.

If then the butting of the locomotive upon the cars sent the latter back a hundred feet, and if appellant's

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foot was caught and slid back on the rail but fifty or sixty feet, how are we to conclude that the train could have been stopped "within four feet from where the plaintiff's foot was caught," and in time to save appellant's foot?

We think that the allegations in the complaint fail to show that the engineer in charge of the train had knowledge of appellant's peril; and we are of opinion, moreover, that the allegations do show that, even if he had such knowledge, he could not have stopped the train in time to avoid the injury. See *Parker, Admr., v. Pennsylvania Co.*, 134 Ind. 673 (23 L. R. A. 552).

No willful or wanton wrong to appellant is, therefore, shown, and there being no question of negligence, the judgment is affirmed.

Filed October 15, 1895.

No. 17,533.

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144	457

LAMPORT, ADMX., v. THE LAKE SHORE AND MICHIGAN
SOUTHERN RAILROAD CO.

RAILROAD.—Presumptive Evidence.—Person Run Over by Train and Killed.—A person run over by a train, while walking upon the track, will be presumed to have observed the approach of the train, or to have been able to observe it if he had listened and looked, where the train was in fact observable fifteen or twenty rods away.

SAME.—Personal Injury.—Burden of Proof.—Trespasser.—Care.—The burden is upon plaintiff in an action to recover for the death of a person killed by a train, while walking on a railroad track, to show that the deceased was in the exercise of reasonable care, whether he was a trespasser or not.

From the St. Joseph Circuit Court.

A. Anderson, for appellant.

Lamport, Admx., v. The Lake Shore & Michigan Southern R. R. Co.

F. E. Baker and C. W. Miller, for appellee.

MCCABE, J.—The appellant, as administratrix of the estate of Hortensius M. Lamport, sued the appellee, in a complaint of two paragraphs, for ten thousand dollars damages to the widow and children of said decedent, in causing his death through the alleged negligence of the appellee, as charged in the first paragraph, and through its willfulness, as charged in the second paragraph of the complaint.

At the close of the plaintiff's evidence, the trial court instructed the jury to return a verdict for the defendant, which the jury accordingly did, upon which the appellee had judgment over appellant's motion for a new trial.

Error is assigned here on the action of the circuit court in overruling that motion. It appears from the evidence, that the decedent and his brother-in-law, Henry Boles, while approaching the appellee's station from the west, on one of the appellee's side tracks, at the village of Osceola, in St. Joseph county, were both struck and killed by a backing gravel train, in the evening of March 25, 1892.

The appellee's railroad runs east and west at said station and village, and the village, containing about 100 inhabitants, lies east of the station or passenger depot. The appellee has four tracks, all passing on the north side of the depot. Two side tracks and two main tracks; the north track and the south track are side tracks.

Boles lived on a farm a little north of west of the depot, 35 or 40 rods, the railroad running through his farm. His house was five or six rods north of the track. He had lived there 17 years.

People coming on foot from that direction to the depot were in the habit of walking on the appellee's tracks, for some distance west, up to the depot, and had been for years.

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The decedent, Lamport, lived at Kendallville, Indiana. He frequently visited his brother-in-law, Boles, and was familiar with all the surroundings, the running of the trains on appellee's railroad at that place and the tracks. Outside of the road-bed, the ground was wet and soft, with some water standing in low places, though there was grass on it, and wagon loads of wheat had been frequently hauled over it, and there was no way provided for persons coming on foot from the west to the depot to avoid water and mud without walking on the road-bed of appellee. There were croquet grounds on appellee's grounds at the place, and such grounds of appellee were 15 rods wide on each side of the tracks. The decedent, Lamport, on the day mentioned, came to the house of Boles, bringing with him his mother, who was also the mother of Mrs. Boles, to stay a few days with her daughter, arriving there on a west-bound passenger train over appellee's railroad about 3:00 o'clock in the afternoon. Lamport intended to return home on the east-bound passenger train over said railroad, which was due at that station at 7:50 o'clock that evening. He and Boles started to walk from the house to the depot at about 7:30 o'clock for the purpose of Lamport taking passage on that train east to his home. No person ever saw them alive afterwards. Their dead bodies were found next morning lying on the ground, one on the north side and the other on the south side of the north side track, some distance west of the depot, and their hats were found on the back end of the last or hindmost car of the gravel train. About the time they started from Boles' house there was a freight train passed on the south main track west, and the gravel or work train passed east beyond the station about the time they started.

The gravel or work train came in on the north main

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track and left the caboose standing on that track a short distance west of the depot with red lights on it, pulled up east of the depot and backed in on the north side track westward until it came west of the depot. And the facts and circumstances already narrated it is claimed were sufficient to warrant the jury in inferring that the hindmost flat-car in that train while thus backing up, struck and killed Lamport and Boles while they were walking eastward toward the depot meeting it. The evidence further shows that there was no light on that car, but it shows that that train could be seen and heard fifteen or twenty rods away. It is contended that the railroad company was guilty of negligence in not providing a safe way for passengers coming from that direction to get to the depot and not providing a light on the rear end of that train to warn pedestrians and persons approaching the depot, from that direction, of the approach of the train. The foregoing is the substance of all the evidence.

We may concede, without deciding, that the company by the foregoing facts in evidence is shown to have been guilty of negligence, and yet that is not enough to establish the appellee's cause of action as alleged in the complaint. It is alleged in the first paragraph thereof, that, "while in the exercise of ordinary care and without any fault on their part (they were) run against and struck by said flat-car and were thereby mortally injured and killed." The second paragraph charges a willful killing, but there is no claim or pretense by the appellant that there is a particle of evidence to prove such a killing. So that it is essential to prove, by some evidence, that the plaintiff's intestate was exercising ordinary care and free from fault or negligence contributing to his injury and death.

In *Mann v. Belt R. R., etc., Co.*, 128 Ind. 138, p. 142,

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this court said : “ ‘When one approaches a point upon the highway, where a railroad track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term ‘ordinary care under the circumstances’ shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The *quantum* of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. * * * If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*.’ ” To the same effect is *Indiana, etc., R. W. Co. v. Greene, Admx.*, 106 Ind. 279. The duty to exercise care and caution is no less incumbent on one who is walking upon a railroad track, either with or without the permission of the railroad company, because, as was said in the case just quoted from, “The presence of a railroad track upon which a train may at any time pass, is notice of danger,” and, as was said in *Pennsylvania Co. v. Meyers, Admx.*, 136 Ind. 242 (262–263), “If we were wrong in assuming that the decedent, at the time the accident occurred, had no

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right to be on the track, and if, in fact, he had a legal right to be there, still if * * decedent, by his own negligence, contributed materially to the production of his own injury, then he cannot recover, because, in that case, he has no cause of action, even though the appellant's negligent conduct also contributed to the production of the injury." As was said in *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43 (49), "The track of a railroad belongs to the company, and is in no sense a public highway to those who are not being transported thereon. At public crossings, the public have the right to cross the track of a railroad, but in so doing all persons are required to exercise reasonable care and caution to avoid receiving injury, and the company is compelled to exercise the same degree of care and caution to prevent the infliction of injury. But between the stations and public crossings the track belongs exclusively to the company, and all persons who walk, ride, or drive thereon are trespassers, and if such persons walk, ride, or drive thereon at the sufferance or with the permission of the company, they do so subject to all the risks incident to so hazardous an undertaking."

But it is contended that the company, by failure to provide a safe approach to its passenger depot, and by long acquiescence in the use of its tracks for such purpose by the public, authorized the public and the decedent to use the tracks of appellee, as the most convenient approach to its passenger depot. As was said in *Pennsylvania Co. v. Meyers, Admx., supra*: "But conceding, without deciding, that the appellee's intestate had a right to go on the railroad track of appellant for the purposes named, that did not absolve him from the duty to exercise due care for his own safety."

The burden was on appellee to show that the deceased

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exercised such care. *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280 (8 L. R. A. 593); *Ohio, etc., R. W. Co. v. Hill, Admx.*, 117 Ind. 56; *Louisville, etc., R. W. Co. v. Stommel*, 126 Ind. 35; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1; *Chicago, etc., R. W. Co. v. Hedges, Admx.*, 118 Ind. 5.

It was said, in *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25, that "When a person crossing a railroad track is injured by a collision with a train, the fault is *prima facie* his own, and he must show affirmatively, that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury."

As was said, in *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind., p. 31 (40): "This presumption is at least sufficient to require from him an explanation of his relation to the occurrence, and an affirmative showing that the circumstances were such, and his conduct such, that he was not in fault."

Here the evidence shows that the appellant's intestate could have both seen and heard the backing train that collided with him and Boles and killed them, if he had attentively listened and looked. Under such circumstances, the law will assume that he actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened. *Cones, Admr., v. Cincinnati, etc., R. W. Co.*, 114 Ind. 328, at page 330.

Under such a state of the evidence, the trial court did not only not err in directing a verdict for the defendant, but did the only thing which it could do without erring. Hence there was no error in overruling the motion for a new trial.

The judgment is affirmed.

HOWARD, J., took no part in this decision.

Filed October 15, 1895.

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Mo. 17,622.

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HAMILTON v. THE STATE.

CRIMINAL LAW.—*Reasonable Doubt.*—*Evidence Insufficient.*—A conviction will not be affirmed where the evidence leaves standing a reasonable hypothesis of innocence.

SAME.—*Larceny.*—*Evidence Insufficient.*—A conviction of theft of money is not justified by evidence that the accused without apparent necessity pressed against the prosecuting witness while standing at the bar of a saloon, and afterwards resisted arrest, where there were a number of men in the saloon at the time, and the loss was not discovered until after the prosecuting witness had left the saloon and gone to another place where he might have lost the money.

SAME.—*Larceny.*—*Information.*—*Intent.*—The omission from an information for theft, of an allegation of an intent to deprive the owner of the property stolen, does not render it defective, where the charge is substantially in the language of section 2007, R. S. 1894, and qualifies the taking as felonious.

From the St. Joseph Circuit Court.

F. M. Jackson and *J. W. Talbot*, for appellant.

W. A. Ketcham, Attorney-General, and *O. M. Cunningham*, for State.

HACKNEY, J.—The appellant was prosecuted and convicted, in the circuit court, upon an information charging that he, with others, on the 18th day of March, 1895, at, etc., did “unlawfully and feloniously take, steal, and carry away, of the personal property of Jacob Miller, sixteen dollars in money, then and there of the value of sixteen dollars, contrary to the form and statute, etc.”

The action of the circuit court, in overruling appellant’s motion to quash the information, and his motion for a new trial, is assigned as error.

The sufficiency of the information is questioned,

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because of the absence of an allegation that the money was taken with intent to deprive the owner of it. The charge is substantially in the language of the statute defining the offense, R. S. 1894, section 2007; R. S. 1881, 1934. This, ordinarily, is sufficient. *Smith v. State*, 85 Ind. 553; *Bates v. State*, 31 Ind. 72; *Malone v. State*, 14 Ind. 219. The word *feloniously*, employed in the charge, as said in *Scudder v. State*, 62 Ind. 13, “qualified and rendered criminal the * act.” That word, as it is used in the statute defining the offense of larceny, was intended to supply that element of the ordinary definition of larceny implying criminal intent, and its use in the information was, for the same purpose, entirely sufficient.

That the conviction was not supported by the evidence, is next pressed upon our attention with much earnestness, and we have carefully read all of the evidence in the record. It was disclosed that the appellant and another young man were tramping through St. Joseph county when they came upon six other tramps with whom they remained over the night of March 17, and the next morning took the road with their newly chosen comrades. At about nine o'clock, of the forenoon of that day, the eight men reached the village of Littleton, in said county, and entered Rhinehart's saloon, where they remained until near noon. During their visit to the saloon, the prosecuting witness, Jacob Miller, visited the saloon twice, and on the second visit remained until the tramps went away. Miller and the tramps drank frequently and played cards together, and, just before the convivial party dispersed, while standing at the bar taking the final drink, the appellant pressed in against Miller, on the right, and between him and one Gross who stood very near. It is not clear that it was necessary for the appellant to do so that he might reach the

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bar, but at that point he secured his glass and took the drink. When Miller went to the bar on this occasion, he had in a purse, kept in a pocket on the right hip, from fifteen to seventeen dollars in money, consisting of one ten dollar bill, one two dollar bill, and some silver money. That Miller had money in that pocket, the appellant had an opportunity to know. When this last drink had been taken, the appellant and his comrades left the room and went to Bremen, a point some six miles distant, leaving Miller and some others in the saloon. After the departure of the tramps, some two or three minutes, Miller went out of the building to an out house, and after he had been there from three to five minutes, he discovered that his purse and money were missing. Returning to the saloon, he remained some time, when he told his friend, Gross, that the "hobos" had taken his money, whereupon he and Gross drove to Bremen, where a posse was organized and armed and went out to arrest the tramps. The tramps were soon overtaken, and a number of shots were fired, ranging some where from fifty to four hundred, and whether by the posse only, or by the posse and the tramps, is in doubt, but, during the storm of shots, the appellant attempted to scale a fence and reach the marsh thicket beyond. This attempt was frustrated, and the appellant and six others of his comrades were arrested. This, we think, is a fair statement of all of the evidence in the record, upon which the State could rely to convict the appellant of the alleged crime, or to prove that a theft was committed. We have not, in this statement, attempted to weigh conflicts in the evidence, though there are a few which are of but little importance, but we have stated the facts as they appear most favorable to the appellee. In our opinion, the facts fall short of establishing conclusively the appellant's guilt.

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The facts do coincide with the conclusion of guilt, but they do not exclude every reasonable hypothesis of innocence. They show a possible opportunity to have picked the pocket of Miller, but even this possibility is not enhanced by any fact which points surely and unerringly to the conclusions that the purse was taken from the pocket. The discovery by Miller, after the appellant had forced in between him and Gross, that he had lost his purse, was after the final drinks, was after the appellant had gone from the saloon some minutes, and after Miller had gone to an out house and remained some minutes longer. If the possible opportunity mentioned had been accompanied by any act indicating an effort, on the part of the appellant, to hide the purse, or if money, of the character of any of that lost, had been found in the possession of the appellant when arrested, such fact would have aided the conclusion that the money had been stolen, and that the appellant was the thief. If the evidence had excluded the hypotheses that no other than the appellant had an opportunity to take the money, and that instead of its having been taken, it had been dropped from Miller's pocket upon the floor, or while going to the out house, or in the out house, the case could have rested upon a stronger support. Instead of the evidence so showing, it fails to establish any search for the missing purse, and shows affirmatively that at the time it is claimed the appellant pressed between Miller and Gross, there were several others crowding about Miller.

Where the evidence leaves standing some reasonable hypothesis of innocence there can be no conviction, and when the record discloses that fact to the appellate tribunal, a judgment of conviction cannot be affirmed. It is not the rule that this court will not pass upon the sufficiency of the evidence to support the finding of the

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lower court, but the rule is, as often declared, that this court will not weigh the evidence to pass upon conflicts therein, and will not disturb a finding which has evidence sufficient to support it when all contradictions and explanations of such evidence are disregarded. The transcript of the evidence in this case does not suggest a careful and accurate stenographic report of the testimony, and possibly there are omissions of evidence, upon which the able and learned judge of the lower court acted. However this may be, we are governed by the record as we find it.

The judgment of the circuit court is reversed, with instructions to grant the appellant's motion for a new trial, and the warden of the State's prison north is directed to return the appellant to the sheriff of St. Joseph county.

HOWARD, C. J., did not participate in this case.

Filed October 15, 1895.

No. 17,894.

CITY OF HUNTINGTON *v.* GRIFFITH.

APPELLATE PROCEDURE.—*Clerk's Certificate.*—*Reporter's Longhand Manuscript of Evidence.*—*Copy.*—A clerk's certificate that the record on appeal contains copies of all proceedings is conclusive upon the Supreme Court, that the bill of exceptions is in the transcript by copying the original longhand manuscript of the evidence, and not by incorporating such original therein, as contended by the counsel for appellee.

MUNICIPAL CORPORATION.—*City.*—*Changing Grade of Street.*—*Evidence.*—The establishment by a city of a prior street grade, essential to the right of a property-owner to recover damages for an alleged change of grade, should be shown by proof of authoritative acts and proceedings of the common council, in adopting a former town grade, or in designating a new grade.

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From the Huntington Circuit Court.

J. B. Kenner and U. S. Lesh, for appellant.

J. M. Hatfield, for appellee.

HACKNEY, J.—The circuit court enjoined the appellant from establishing a grade, and improving, according to such proposed grade, a street in said city.

The petition alleged that the town, now city, of Huntington had, by surveys, grade records, and ordinances, established a general grade for said town, and a special grade for the street in question; that in the year 1873, said town was incorporated as a city, and thereafter, to-wit, on the 7th day of September, 1877, the common council of said city adopted an ordinance to grade and gravel part of North Jefferson street, and boulder the gutters on each side of part of said street; that in said ordinance the city civil engineer was directed to set the proper grade stakes, and advertise for the execution of said work; that in pursuance of said ordinance, by order of the common council, the city civil engineer did set the proper grade stakes in pursuance to the established grade of said city, and where the said lots abut on said Jefferson street, and the street was then and there improved as provided for in said ordinance, which improvement when completed was accepted by said city; that still later, and in March, 1894, the appellant, by ordinance, survey, etc., sought to establish a grade for said street, the effect of which would be to reduce the existing grade in front of the appellee's lot five or six feet, to the injury of said lot, and to her damage, all without the assessment, payment, or tender to appellee of any damages on account of such proposed grade.

The petition is indefinite in its allegations of the former establishment of a grade for said street, and renders it

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difficult to determine the theory upon which the appellee claimed the existence of a former established grade, whether by implication the former grade of the town was in force, or whether by the affirmative adoption of the grade established by the town became the city grade, or whether a new grade was established by the city, in the proceedings of September, 1877. The lower court rendered a special finding upon the theory that a former grade had been established by the appellant city, which had been adopted by it in its proceeding of September 7, 1877, but whether established by the adoption of another, or by independent action, would seem to make no difference, so that it was authoritative. Accepting the construction of the petition by the lower court, and this, we think, is the most reasonable theory presented by the pleading, the demurrer was properly overruled, and all of the objections urged against the petition might have been cured upon motion to make more specific. It is true that a city is not liable for damages arising from the establishment of a street grade in conflict with a grade established by a former town corporation, embracing the same territory. *City of Wabash v. Alber*, 88 Ind. 428. It is equally true, however, that a city may not change a street grade legally established by it, without first assessing and paying, or tendering, the damages occasioned by such change, to the abutting property-owner. R. S. 1881, section 3073; R. S. 1894, section 3508; *City of Logansport v. Pollard*, 50 Ind. 151; *City of Kokomo v. Mahan*, 100 Ind. 242; *City of Lafayette v. Wortman*, 107 Ind. 404; *City of Lafayette v. Nagle*, 113 Ind. 425; *City of Anderson v. Bain*, 120 Ind. 254; *City of Valparaiso v. Adams*, 123 Ind. 250; *City of Jeffersonville v. Myers*, 2 Ind. App. 532.

The allegation that, pursuant to an ordinance, the stakes were set according to the established grade of

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said city, and the improvement made and accepted in accordance therewith, while general and subject to be made more particular, is, as we have said, sufficient, as against a demurrer, and as alleging the maintenance of a former grade established by the city. It negatives the idea of a mere smoothing of the surface of the street, preparatory to placing the gravel. This conclusion is not at variance with *Mattingly v. City of Plymouth*, 100 Ind. 545, which holds that "Until proceedings are had by the common council directing that the grade of a certain street or streets, or specified portions thereof, shall be established, or that a grade already established is approved and adopted in some authoritative way by the common council, it cannot be deemed that the 'City authorities have once established the grade of a street.'" Our conclusion rests upon the theory that the general allegation quoted and referred to, implies necessarily some such authoritative action by the city. In the case of *City of Lafayette v. Wortman, supra*, the allegation that the former grade was by "the common council of the city established the grade thereof, in the manner following, viz: 'Beginning at the grade of Earl avenue, and running down to Thompson avenue, in the shape of a depressed curve,'" is not an allegation of the proceeding by which the grade was established, and is at most a statement of the character of the grade. It is not, in our opinion, "a direct allegation as to the establishment of a prior grade," in the sense of setting up the manner of establishing it as insisted by appellant's counsel.

The ruling of the circuit court upon the motion for a new trial is next presented. The court's third finding was as follows:

"That on the 7th day of September, 1877, the common council of defendant adopted an ordinance to grade and gravel part of Jefferson street, including that part

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embracing plaintiff's premises, and to boulder the gutters on each side of said street. In said ordinance it was ordained that said street should be reduced to the established grade of said city. *Prior to said date, the city civil engineer of said city by the directions of the common council thereof, made, established, and recorded the grade of said North Jefferson street along said property, which grade was reported to said common council, and was accepted, approved and adopted by said common council as the grade of said street.* The profile and specifications were at the time on file at the chambers of said common council. Said street was so reduced to said grade, and gutters were constructed in accordance with said grade, and the street leveled, all to the acceptance of the city civil engineer, in accordance with said plans and specifications in said ordinance directed, and this was all done after due notices had been given for sealed bids until October 5, 1877, and under contract with appellant."

That part of the finding in italics is attacked as not supported by the evidence. We have carefully read the evidence, and have been unable to find in it a support for the finding that prior to the proceeding of September 1877 the city established a grade for the street in question. Notwithstanding the appellant's challenge, the appellee has failed to point out any evidence supporting that finding. There was evidence tending to support the allegation that the town had established a grade for said street, but there was no evidence tending to support the possible theory that the grade so established was affirmatively adopted by the city prior to the proceeding of September, 1877, and it must be remembered that the finding is of an affirmative establishment of a grade by direction to the engineer, and by such grade being established and recorded, and "reported to

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said common council, and accepted, approved, and adopted by said common council as the grade of said street.”

The direction to the engineer, in the ordinance of September, 1877, to set the stakes to the established grade of said city, or that the “street be reduced to the established grade of the city,” might suggest the possible inference of a previously established grade, but it does not authorize a finding as an independent fact that the council had directed the establishment of a grade; that the engineer had designed the grade, had recorded the same, and had reported the fact to the council, and which report had been “accepted, approved and adopted by said common council.” There is evidence also tending to support the theory that in and by the proceeding of 1877 a grade was established; this, however, is not the establishment of the grade as found by the court to have been made “prior to said date.” This evidence is not complete since it is partly oral, and while stating abstractly the action of the council, it is no where shown what were the contents of any lost paper or record. It is true that the record presents a profile of the grade for the improvement of 1877, but it is not shown when it was filed, or that the council ever considered it, or took any action with reference to it.

The record is not satisfactory in its presentation of the evidence, as it commingles oral and documentary evidence without regard to the order of time, and in some instances by interrogatories addressed to, and answered by, the witnesses from prints upon plates or diagrams not disclosed by the record. If the able and careful judge who presided during the trial was not deceived by the evidence, the record certainly is incomplete, and does not present to us all of the evidence upon which he acted. By the authorities we have cited, it must appear that the change must be of a grade established by the

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city. As said in *Mattingly v. City of Plymouth, supra*, in speaking of the statute permitting damages for such change, "It is plainly inferable that the grade, the establishment of which is here referred to, and which cannot be changed without the assessment and tender of the damages occasioned thereby, is a grade established in pursuance of some ordinance or order of the common council, involving some general plan of improvement, or grading of a street or specified portion thereof. And such grade, when established, must be approved and adopted in some way, by the common council, and should be made a matter of record. The record of the survey establishing the grade should appear in the record which the civil engineer is required to keep, and the proceedings of the council should, in some way, either by ordinance or resolution, show that the survey establishing the grade was authorized or approved, so as to make it authoritative." The evidence discloses no such establishment of grade upon any of the theories possible under the complaint. Appellee suggests that the evidence is not in the record by bill of exceptions in proper form. The original bill is embodied in the record, and it makes, by incorporation and adoption, the long hand manuscript of the evidence a part of the bill. The judge certifies that the bill contains all of the evidence, and he makes that contained in the bill a part of the record.

This is sufficient, though the manuscript may purport to have been copied from shorthand by a stenographer. Elliott App. Proced., section 821, and authorities there cited.

The judgment of the circuit court is reversed with instructions to sustain appellant's motion for a new trial.

Filed June 11, 1895.

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ON PETITION FOR REHEARING.

HACKNEY, J.—In her petition for a rehearing, the appellee earnestly insists that the evidence disclosed the establishment, prior to September 7, 1877, of a grade for the street in question, both by the action of the former town, adopted impliedly by chartering as a city under the statute, and as proven by the recitals of the ordinance of September 7, 1877. As held in the original opinion, the acceptance of a city charter does not impliedly work an adoption, by the city, of street grades established by the former town, in the sense that, under the statute creating a liability, the city may not establish a grade. *City of Wabash v. Alber*, 88 Ind. 428.

The recitals in the ordinance of September 7, 1877, not only do not establish, or purport to establish, a grade, but they are far short of the evidence required to show that the city had taken, by corporate action, the steps necessary to establish such alleged prior grade. *Mattingly v. City of Plymouth*, 100 Ind. 545.

If, prior to September 7, 1877, as the trial court found, the city had established a grade for the street in question, that fact should have been proven by showing the authoritative acts and proceedings of the common council in adopting the former town grade, or in designating a new grade. Again it is insisted that the evidence is not in the record, first, because the bill of exceptions contains the original long hand manuscript of the evidence which, it is further claimed, was not filed; and, second, because the only certificate that the bill contains all of the evidence is that of the stenographer. As to the first objection, we will say that the record discloses that the bill of exceptions was filed within the time allowed, and the clerk certifies, not that the record contains the original, but that it contains copies of all pro-

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ceedings, etc. It is, perhaps, true, as counsel suggest, that to bring the original long hand manuscript into the record, instead of by copy of the bill of exceptions, it must appear to have been filed. We must accept, however, the clerk's certificate as conclusive that the bill of exceptions is in the transcript, by copying the original, and we are not permitted to take the statements of counsel, that the transcript contains the original, and not a copy. As to the second objection to the bill, counsel are mistaken. It clearly appears in the certificate of the judge, that the bill contains all of the evidence given in the cause.

The petition for a rehearing is overruled.

Filed October 16, 1895.

No. 17,643.

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APPELLATE PROCEDURE.—*Jurors.—Opinions Expressed.—Finding.—*

The finding of the trial court, that the charge that certain jurors had expressed opinions as to the merits of the case, is not sustained, is conclusive on appeal, where there is evidence supporting it.

SAME.—*Instructions.—Murder.—Self-defense.—Reasonable Doubt.—*

The refusal of a requested instruction in a prosecution for murder, in which the facts claimed to have been proved by the defendant and the law applicable thereto are stated, is not prejudicial, where the instruction on the law of self-defense, which was the only defense relied upon, was full and complete and favorable to the defendant, and the law as to reasonable doubt and presumption of innocence was fully explained.

CRIMINAL LAW.—*Homicide.—Self-defense.—*The law will not, as a general rule, excuse one who repels a blow with the fist by stabbing his assailant.

INSTRUCTIONS TO JURY.—*Consideration of Evidence.—Criminal Law.—Impeachment.—*An instruction in a criminal case, that the jury should consider the impeaching evidence in estimating the

142	288
142	655
142	288
145	17
147	221
147	379
142	288
148	253
152	231

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153	586
153	692

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156	596

142	288
159	12

142	288
163	378
163	494
163	507

142	288
165	623

142	238
169	242

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weight to be given the testimony of a witness, and also the fact, if they so find it, that the moral character of a witness has been successfully impeached, is proper.

SAME.—Murder.—Self-defense.—Self-defense is sufficiently covered by a charge in a prosecution for murder, requiring that, before conviction, even in the lowest degree, each of the jury must be satisfied under the evidence of the existence of every ingredient of the crime, and convinced of defendant's guilt beyond a reasonable doubt, "by the evidence of whatever class it may be, and considering all the facts and circumstances in the evidence as a whole," and stating that the burden is on the prosecution to prove that the accused actually killed the deceased "under such circumstances as the law will not excuse," where it was the only defense.

From the Criminal Court of Marion County.

Duncan & Smith, Van Vorhis & Spencer and McCullough & Spaan, for appellant.

W. A. Ketcham, Attorney-General, *C. S. Wiltsie*, Prosecuting Attorney, and *J. B. Elam*, for State.

HOWARD, C. J.—The appellant was indicted for murder in the first degree, for the killing of Western B. Thomas. On the trial he was found guilty of manslaughter, and was sentenced to imprisonment in the State prison for eighteen years.

The only error assigned on this appeal is the overruling of the motion for a new trial.

Under this assignment, it is first contended that the court erred in giving to the jury, of its own motion, instruction number twenty.

The instruction reads as follows :

"If you believe, from the evidence, that any witness, before testifying in this case, has made any statements out of court, concerning any of the material matters, materially different and at variance with what he or she has stated on the witness stand, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness,

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and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony, and if the jury believe from the evidence that the moral character of any witness or witnesses has been successfully impeached on this trial, then that fact should also be taken into consideration in estimating the weight which ought to be given to the testimony of such witness or witnesses."

It is objected that, "In giving the first part of the instruction, the court clearly invaded the province of the jury, as to the weight to be given to evidence, by telling the jurors, as a matter of law, what certain evidence tended to prove." And a dictum is quoted from *Guetig v. State*, 63 Ind. 278, at p. 282, to the effect that, "What evidence proves, or tends to prove, after it has gone to the jury, is a question solely for the jury to decide; and it is error for the court to interfere with their decision upon the weight of evidence, by an instruction."

In the *Guetig* case there was evidence introduced at the trial, which tended to prove that the appellant was subject to attacks of epilepsy. There was in that case also evidence tending to show that epilepsy is a disease which tends to produce insanity. The insanity of the appellant was urged as his main defense.

Under these circumstances, the court instructed the jury in that case that "this evidence would not be sufficient to raise a reasonable doubt of [appellant's] sanity at the time of the alleged commission of the homicide."

The instruction was condemned by the court, "because it directly states that certain evidence, which is legitimately before the jury, is not sufficient to prove a certain fact, or to raise a reasonable doubt of a certain fact."

There can be no question that the ruling so made

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was correct. The instruction directly charged the jury as to what weight they should give to the evidence. That is a matter exclusively within the province of the jury. The decision in that case, however, goes no further; and we do not think it is authority on the point now before us.

The evidence referred to in the instruction in the case at bar, was concerning statements made by a witness out of court, materially different from those made by the witness in court. As to such evidence of statements made out of court, the words objected to in the instruction are: "The jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony."

We think the plain intent of this clause of the instruction was to inform the jury as to the character or tendency of the evidence in question, namely, that it was impeaching; in other words, that its introduction was allowed because it tended to impeach the witness, and not because it tended to establish any issue in the case. The manifest purpose of the instruction was, therefore, to point out the nature of the evidence, and to limit the consideration to which it was entitled by the jury.

This was strictly the province of the court. Indeed, the court, in the very act of permitting the introduction of any item of evidence, must of necessity pass upon its tendency. If the evidence offered does not tend to prove any material issue in the case, or to impeach a witness, or to serve any other legitimate purpose of the trial, the court must exclude it. This is not weighing the evidence, but it is passing judgment upon the tendency, character, or purpose of the evidence.

While the jury are the sole judges of the facts, and

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also have the right in criminal cases to determine the law (Cl. 5, section 1892, R. S. 1894; section 1823, R. S. 1881); yet, by the same statute it is required that the court charge the jury as to the law, and also, that "in charging the jury he must state to them all matters of law which are necessary for their information in giving their verdict."

It was certainly necessary, for the information of the jury, that they should be told the nature of the testimony referred to, namely, that it was impeaching, that it was not introduced to prove any issue in the case, but solely tended "to impeach either the recollection or the truthfulness of the witness."

Otherwise, and had the instruction not been so given, the jury might have thought it their duty to apply the evidence to the issues in the case. It was thus in the interest of the appellant himself, as well as of the State, that the jury should be informed that the tendency or purpose of such evidence was solely to discredit a witness, and not to establish any issue, either for or against either party.

It is also claimed to be error that the court charged that "the jury should consider" the impeaching evidence introduced, in estimating the weight which ought to be given to the testimony of the witness; and should also, for the same purpose, take into consideration the fact, if they should so find it, that the moral character of any witness had been successfully impeached.

We do not think that in making this charge the court invaded the province of the jury. It cannot be doubted that, under the law, it is the duty of the jury to consider all evidence introduced on the trial and not withdrawn by the court. The evidence is introduced for that very purpose, namely, that it may be considered for what it is worth. What weight, if any, the jury may give to

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any item of evidence is for them to say. But they are not justified in failing to give consideration to the evidence brought before them. And, surely, if it is their duty to consider the evidence, it cannot be error for the court to so tell them. The very purpose of the instructions of the court is to inform the jury of their duty. *Newport v. State*, 140 Ind. 299; *Deal v. State*, 140 Ind. 354.

It has been sometimes said that the word "should" in such a charge is of too imperative a character; that the expression ought to be: "It is the duty of," or, "It is the province of the jury;" or, "The jury ought to," or, "The jury may," consider, etc. *Lynch v. Bates*, 139 Ind. 206. And we are inclined to think that it might be better to use such permissive form rather than the seemingly imperative form here used. It would be better that there should not be even the appearance of error. Yet it is but a matter of expression, and the essential meaning is not changed. In any of the forms used, the jury are told only what is their duty, namely, to consider the evidence adduced on the trial. What weight, if any, ought to be given to such evidence, is for the jury alone to say; and the instruction does not trench upon that right.

Neither is it true that the instruction singles out or discredits any witness or class of witnesses. The language used by the court is general in form, and applies to all the witnesses who may be affected by it, without specifically pointing out any.

It is next insisted that the court erred in refusing to give instruction number seventeen, asked by the defendant, which is as follows:

"And at this point the court instructs you as to the defense set up by the accused, that he killed Thomas in self-defense, that in order for the defendant to succeed under that plea, it is not required that the evidence

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should satisfy that the killing was justifiable, under the doctrine of self-defense as hereinbefore given. Under this plea the defendant cannot be convicted if upon the whole evidence you or one of you entertain a reasonable doubt whether the killing was not done under such circumstances as rendered it justifiable."

The contention here made is that nowhere is there any instruction given which covers the point covered by this instruction, namely, that the rule of reasonable doubt applies to the defense of self-defense. We do not think this contention is justified.

It is not doubted that the only defense shown in the record is that of self-defense. The time, place and circumstances of the killing are not in dispute, nor is the fact that the killing was done by the appellant. The sole issue on the trial was whether the killing was excusable on the plea of self-defense. With that condition of affairs, we think the instructions given by the court fully covered that here requested. In two instructions, the tenth and the thirteenth, the court fully advised the jury as to the rights of the appellant under his plea of self-defense, the only plea made by him. In the eleventh instruction the presumption of innocence is dwelt upon, and the jury are admonished that the appellant cannot be convicted of even the lowest degree of crime covered by the indictment until the evidence satisfies them, and each one of them, of the existence of every ingredient of the crime charged. In the twelfth instruction the jury are fully informed on the doctrine of reasonable doubt as applied to the case; and they are told that before conviction they must be convinced beyond a reasonable doubt, "by the evidence, of whatever class it may be, and considering all the facts and circumstances in the evidence as a whole."

Even more than this, the court, in its first instruction,

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after stating the charge as made in the indictment, sets forth the appellant's defense, making also specific allusion to the plea of self-defense, the only excuse urged, or that could be urged, by him for the killing. "To this indictment," says the court, "the defendant enters the general plea of 'not guilty.' Upon the issue thus joined, the burden is upon the State to prove, beyond all reasonable doubt, every material allegation of the indictment, that he actually killed Western B. Thomas, in manner and form, and at the time charged in the indictment, and that such killing was done under such circumstances as the law will not excuse."

Had the killing been done in self-defense the law would have excused it; and that the killing was not so done, that such excuse does not exist, must be proved by the State, says the instruction, "beyond all reasonable doubt."

We think, therefore, that the jury were in fact fully informed that the rule of reasonable doubt applied to the whole case, and to every specific part of it, including the defense of self-defense. Consequently there was no error in refusing to give instruction seventeen as requested.

Complaint is next made that the court refused to give instruction number twenty-three, asked by the appellant, and in which the facts claimed to have been proved by him, with the law applicable thereto, are stated. These facts, and the law claimed to apply thereto, relate to appellant's plea of self-defense.

The court gave twenty-one carefully prepared instructions, in which the jury were very fully and fairly informed of their duty as to the whole case, and also as to the rules of law applying thereto. The instructions relating to self-defense were most favorable to the appellant.

As said, in *Koerner v. State*, 98 Ind. 7, "When the

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court has put the whole case to the jury by proper and full instructions, as was done in this case," it is not necessary to instruct upon each separate item of evidence, nor to direct the jury to determine between the different theories of the State and the accused.

The tenth instruction given by the court, was as follows :

“The defendant insists that the killing of Western B. Thomas was done in self-defense and this requires the court to instruct you as to the doctrine of self-defense. One man may kill another under such circumstances as that the homicide constitutes no crime, but is justified by the law. The doctrine of self-defense as applied by the evidence in this case may be thus defined : ‘Where a person being without fault, and is in a place where he has a right to be, so far as his assailant is concerned, is violently assaulted, he may, without retreating, repel force by force, and he need not believe that his safety requires him to kill his adversary in order to give him a right to make use of force for that purpose. When from the acts of his assailant he believes and has reasonable ground to believe that he is in danger of losing his life or receiving great bodily harm from his adversary, the right to defend himself from such danger or apprehended danger may be exercised by him, and he may use it to any extent which is reasonably necessary and if his assailant is killed as a result from the reasonable defense of himself he is excusable. The question of the existence of such danger, the necessity or apparent necessity as well as the amount of force necessary to employ to resist the attack can only be determined from the standpoint of the defendant at the time and under all the existing circumstances. Ordinarily one exercising the right of self-defense is required to act upon the instant and without time to deliberate and investigate,

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and under such circumstances the danger which exists only in appearance is as real and imminent as if it were actual.”

With this instruction, so full and complete on the law of self-defense, and so favorable to the appellant, and with others on the subject of reasonable doubt and on the presumption of innocence, and with still another on self-defense as an excuse for the killing of an adversary, we cannot see that the appellant suffered any harm by the refusal of the court to give instruction twenty-three, as requested.

It is contended that the verdict is not supported by the evidence. The verdict was for manslaughter. There is no question that the deceased was unarmed, and that the appellant cut his throat with a knife, causing death in a few moments. We think that from the evidence of those present, even from that of the appellant himself, the jury might conclude, without any reasonable doubt, that the appellant unlawfully killed the deceased, voluntarily and upon a sudden heat, and that he had not the excuse of self-defense for his act. It is uncertain, from the evidence, whether the deceased simply laid his hand upon appellant, in a sort of maudlin familiarity, or whether he struck at appellant with his fist after they began quarreling. It is certain, however, that the deceased was unarmed, and, at most, that, in their scuffle, he struck appellant with his fist. But, as a general rule, the law will not excuse one who repels a blow with the fist by stabbing his assailant. *Presser v. State*, 77 Ind. 274; *Floyd v. State*, 36 Ga. 91, 91 Am. Dec. 760; 21 Am. and Eng. Ency. Law, 1059. And the jury might well find from the evidence that there were no circumstances why the case at bar should form an exception to this general rule.

A like contention is made as to whether two of the

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jury had not expressed opinions as to the merits of the case before they were selected to try it. The court tried this question, by bringing together the two jurors and the witnesses who had filed affidavits against them; and all were questioned under oath, when the court found that the charge was not sustained. There being evidence to support this decision, we cannot, under the well established rule, disturb it on this appeal.

There appearing no available error in the proceedings, the judgment is affirmed.

Filed October 16, 1895.

No. 17,110.

LILLY ET AL. v. SOMERVILLE ET AL.

APPELLATE PROCEDURE.—*Notice.*—*Appeal by Some of Several Co-Parties.*—*Dismissal.*—An appeal by some of several co-parties will be dismissed where the other co-parties have not been served with notice as required by section 647, R. S. 1894 (section 635, R. S. 1881).
 SAME.—*Parties Appellant.*—*Mistake in Name.*—*Idem Sonans.*—*Notice.*—The fact that one of several co-parties appealing is named as Willard G. Bracket raises no presumption that he is the same person as a party to the suit in the lower court described as William G. Brackett, so as to make it unnecessary to serve notice of the appeal upon the latter.

From the Montgomery Circuit Court.

J. L. Shrum, for appellants.

J. West, for appellees.

HOWARD, C. J.—This was an action to quiet title to real estate, brought by appellees, as plaintiffs, against “Channing Lilly, William G. Brackett and Amandesis H. Soneman, John P. Bible, sheriff,” as defendants.

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142	298
167	552

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There was judgment quieting title "against all adverse claims of the defendants, or any of them."

The assignment of errors shows that the appeal from this judgment was taken by "Channing Lilly, Willard G. Brackett and Amadeasis H. Soneman."

On January 16, 1894, the appellees, having first given notice of their intention to do so to appellants, filed their motion to dismiss the appeal, for several reasons, among them that notice to co-parties not appealing from the judgment, had not been given.

On January 30, 1894, the appellants filed notice to John P. Bible, sheriff, of the appeal, together with his written refusal to join therein. No notice, however, was given of the appeal to the defendants, William G. Brackett or Amandesis H. Soneman; neither were they in any way made parties to the appeal, nor have they declined to join therein.

The consideration of the motion to dismiss was postponed until the final hearing of the case; but appellants have since made no answer to the motion, nor do counsel now take any notice of it in their brief.

Counsel for appellees, however, still insist upon the dismissal of the appeal, for the reasons already given, stating that appellees "have not joined in the assignment of errors and have not signed an agreement for submission, but the submission has been forced under the law;" citing also *Brown v. Trexler*, 132 Ind. 106, to the rule that "Forced submission under the law does not waive any rights the parties would otherwise have."

We are of opinion that the position of appellees is well taken, and that their motion to dismiss the appeal must be sustained.

In *Gregory v. Smith*, 139 Ind. 48, it was held that, under section 647, R. S. 1894 (section 585, R. S. 1881), when a part of several co-parties appeal from a judgment

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against all of them, those appealing must join all such co-parties as co-appellants, and give notice to those not appealing. See also *Holloran v. Midland R. W. Co.*, 129 Ind. 274; *Brown v. Trexler*, *supra*.

In the case of the defendant, "Amandesis H. Soneman," the first, or christian, name is so unusual in itself, and so similar to the christian name of the appellant, "Amadeasis H. Soneman," that, on the principle of *idem sonans*, we might, perhaps, take both names to indicate the same person. But, however this may be, certainly we cannot take the defendant, "William G. Brackett," to be the same person as the appellant, "Willard G. Bracket." The defendant, William G. Brackett, had a right to appeal, and if he should choose to do so, certainly his appeal could not be dismissed on the ground that Willard G. Bracket, another person, had appealed in his stead. If, in fact, both names indicate one and the same person, counsel for appellants, in the period of more than one year since the motion to dismiss was filed, should have taken some means to advise the court of such fact.

In *Brown v. Trexler*, *supra*, the court held the assignment of errors defective, because the christian name of one of the appellants was not given, the name being written "H. Omstead." In the present case the appellant's name is given as Willard, while the defendant's name is William. The assignment of errors is certainly defective. For that reason, and because notice to the co-parties not appealing was not given, the appeal must be dismissed.

Filed June 13, 1895; motion to reinstate overruled October 16, 1895.

Stoffel v. Sellers *et al.*

No. 17,582.

STOFFEL v. SELLERS ET AL.

RECEIVER.—*Amendment of Application For.—Foreclosure of Mortgage.—Expiration of Time for Redemption.*—An application by the assignee of a certificate of sale under foreclosure, for the appointment of a receiver to collect rents and profits and apply the same to the payment of mortgages, may be amended by setting up facts entitling the plaintiff to the relief sought, after the reversal of an order appointing such receiver, although the period of redemption has expired in the meantime, where there is a controversy between the plaintiff and the mortgagor over the amount in the hands of the receiver.

From the Huntington Circuit Court.

B. F. Ibach, for appellant.

J. M. Hatfield, for appellees.

MONKS, J.—On application of appellant a receiver was appointed by the court below, February 23, 1893, to collect the rents and profits of certain real estate upon which mortgages had been foreclosed, and apply the same to the payment of said mortgages. An appeal was taken from this order of the court, and the same was reversed in this court. *Sellers v. Stoffel*, 139 Ind. 468.

On February 2, 1894, after the case had been returned to the court below, the receiver appointed in said cause made a report, in writing, of his receipts and expenditures as such receiver, showing a balance in his hands, and that appellant and appellees both claimed the same. Afterward, on February 18, 1894, appellant asked permission of the court, to file an amended complaint, and at the same time presented the amended complaint and an affidavit in support of said application. The court

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overruled the application, and refused to permit appellant to file the amended complaint, to which action of the court appellant at the time excepted. The court thereupon ordered the balance in the hands of the receiver to be paid to appellees, to which appellant objected and excepted.

The affidavit in support of said application, so far as necessary to the determination of this cause, is substantially as follows:

A mortgage was foreclosed on certain real estate and a judgment for \$1,135 rendered against appellees, and in favor of a building and loan association, on the 2d day of November, 1892.

On the same day a judgment and decree of foreclosure was rendered in favor of appellant, against appellees, for \$204.50, which was a second lien on the real estate. Said real estate was sold by the sheriff on the decree of foreclosure first named to the building and loan association, the plaintiff therein, for \$1,204.08, on January 14, 1893, leaving the judgment and decree of foreclosure in favor of the appellant wholly unsatisfied. Afterwards, to protect his interests in said real estate, appellant purchased and took an assignment of said certificate of purchase. At the time of said sheriff's sale, the real estate was occupied by a tenant of appellees. After said sale the application and order was made for the appointment of a receiver, which was reversed by this court. When the said sale was made, and the receiver appointed, there was a lien on said real estate of \$81.90 for State, county and city taxes. Said real estate was not worth more than \$1,300, and the liens thereon amounted to the sum of \$1,600, and appellees were wholly insolvent and had no real or personal property whatever, out of which said judgment or taxes

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could be made, and were utterly unable to pay any part of said judgment or taxes. On the 14th day of January, 1894, the time of redemption expired, and the said real estate was not redeemed. Wherefore appellant asks that he may amend his complaint, in which he asks for the appointment of a receiver, so as to show these facts, which amended complaint, marked Exhibit "A," he files herewith, and makes a part hereof, and which amended complaint he says is true, and asks that the money now in the hands of the court be paid first on said taxes, and the remainder on said unsatisfied judgment.

These facts are not the same as those presented on the former appeal, and had they been before us then, a different conclusion might have been reached. We think the court below erred in not permitting appellant to file his amended complaint. Appellant, on a proper complaint, has a right to show, if he can, that he was entitled to have a receiver appointed, in February, 1893, and if he establishes such fact, then his right to the money in the hands of the receiver would be the same, and would be determined in the same way, as if a receiver had been properly appointed at that time. The only difference being that the complaint filed now should state not only the facts, showing that he was then entitled to have a receiver appointed, but also facts, showing that he is now entitled to the money in the hands of the receiver.

If the facts, when properly pleaded and proven, give appellant the money on hand, the delay, or the fact, that the year for redemption has expired, cannot deprive him of such right. We express no opinion as to the sufficiency of the amended complaint, which is copied into the record, as that question is not before us.

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Judgment reversed, with instructions to the court to allow appellant to file an amended complaint, and for further proceedings not in conflict with this opinion.

Filed October 17, 1895.

No. 16,970.

THE MEMPHIS & CINCINNATI PACKET CO. v. PIKEY,
ADMINISTRATRIX.

142	304
148	236
151	503

142	304
158	672

APPELLATE PROCEDURE.—*No Reference to Page or Line in Transcript.*—*Deposition.*—In the absence of a reference to any page or line of the transcript where the rulings may be found, a claim of error in respect to suppressing or refusing to suppress questions and answers in depositions is unavailable.

ASSIGNMENT OF ERRORS.—*Collective Assignment.*—*Appellate Procedure.*—Error assigned to a series of instructions given or refused is unavailable if any one of the series is not subject to the objection.

COMMON CARRIER.—*Liability for Injuries Inflicted on Passenger by Servant of Carrier.*—*Defense.*—A carrier cannot escape liability for injuries to a passenger on a steamboat, caused by the quarrelsome, violent, and fighting crew, by showing that men of that class are usually employed for such work. (See note at end of opinion.)

CONFLICT OF LAWS.—*Tort Committed on Ohio River.*—*Jurisdiction.*—*Summons.*—The law governing a right of action for death from a wrong committed on the Ohio river, between Indiana and Kentucky, including the matter of service of summons and return, when the action is brought in Indiana, is the law of that State as much as if the Ohio river was wholly within the State.

SAME.—*Foreign Administrator, Action by in This State.*—The lack of any statute giving a right of action in similar cases in the State where an intestate resided does not preclude a right of action by a foreign administrator for wrongful death in this State, under section 284, R. S. 1881.

JURISDICTION.—*Ohio River.*—Courts of Indiana have concurrent jurisdiction of causes of action arising on the Ohio river, between this State and Kentucky, by virtue of the compact with Virginia, under which Kentucky became a State.

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DEPOSITION. — *Cross-Examination Admissible in Evidence.* — One who has attended the taking of the deposition, and cross-examined the witness, has no power to exclude the reading of the cross-examination as a part of the deposition.

SUMMONS. — *Wharfmasters.—Common Carrier.* — Wharfmasters, who receive and discharge freight for a steamboat company, and are authorized to transact business in the name of the corporation, may be served with summons against the company, if the chief officer of the company is not found in the county, under section 316, R. S. 1881.

SAME. — *Return Of.—Affidavit.—Agent.—Common Carrier.* — Affidavits that persons on whom summons was served, were not agents of a steamboat company, are insufficient to overcome a return of service stating that they received and discharged freight for the company.

From the Dearborn Circuit Court.

C. F. Hayes, Johnson & Levy and *W. H. Jones*,
for appellant.

McMullen, Johnston & McMullen, for appellee.

MONKS, J.—This action was brought in Dearborn Circuit Court by the appellee, a foreign administratrix, against appellant, a foreign corporation, to recover damages for the death of Charles Pikey, under section 284, R. S. 1881, section 285, R. S. 1894, which is as follows :
“When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.”

The case was tried upon the first, third and fifth paragraphs of complaint; the other paragraphs were either

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abandoned at the trial, or demurrers to the same were sustained.

The three paragraphs mentioned each charge in different ways, that the appellant is a foreign corporation and was the owner of a line of steamboats, navigating the Ohio and Mississippi rivers from the city and port of Cincinnati, Ohio, to the city and port of Memphis, Tennessee; which boats were managed and run by appellant for the shipping, transportation and carrying of passengers and freight as common carriers for compensation and hire to and from said cities and to and from all intermediate cities, towns, wharves, and landings upon said rivers; that on the 23d of February, 1892, and long before that time and up to the commencement of this action, the wharfboat at Aurora and the wharfboat at Lawrenceburg, in Dearborn county, Indiana, were wharfboats upon which appellant discharged and received freight and passengers, carried for hire to and from said ports, and the said wharfmasters received and delivered freight for said appellant during all of said time; and that the appellant, by her clerks and captains of the several boats aforesaid, received and delivered freight and passengers at Aurora and Lawrenceburg in Dearborn county, Indiana; that one of the boats so operated by appellant was the "John K. Speed," and that while said steamboat was making a return trip from said city of Memphis to said city of Cincinnati, being then and there owned and operated by appellant, Charles Pikey, appellee's intestate, on February 23, 1892, took passage on said steamboat at the town of Point Pleasant in the State of Missouri, for said city of Cincinnati, and for said purpose purchased from appellant a ticket, in consideration of which the appellant agreed to safely convey said Pikey from said point in Missouri to said city of Cincinnati; that on

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_____ day _____, while said boat was proceeding on its way to Cincinnati and when said steamboat "John K. Speed" was at a point on the Ohio river opposite the county of Dearborn, State of Indiana, which point is also opposite the county of Boone in the State of Kentucky, and while said Pikey was still a passenger on said boat, he was shot and mortally wounded by the second mate on said boat, from which wound he died in Dearborn county, Indiana, on the next day; that the death of said Pikey was caused by the negligence and carelessness of appellant, as alleged in the several paragraphs, and that said Pikey and the appellee were each wholly without fault and in no way contributed to the said injury or death in any way; that said Pikey left surviving him a widow and two children; that he was a citizen and resident of New Madrid county, Missouri; that appellee was duly appointed, by the probate court of said county, administratrix of his estate.

Appellant entered a special appearance and filed a motion supported by affidavits, to set aside the service of summons, which was overruled. The court, on the motion and affidavit of appellant, required appellee to file an undertaking for costs, which was approved. Thereupon appellant filed a special answer as to the jurisdiction of the court over the person of appellant, to which a demurrer was filed and sustained. Appellant filed a demurrer to each paragraph of complaint which was overruled as to the first, third, fifth, and sixth paragraphs and sustained as to the other paragraphs. Answer in four paragraphs was filed, the fourth paragraph being a general denial, a demurrer was filed and sustained to the first, second, and third paragraphs of answer, to all of which rulings proper exceptions were taken. The cause was tried by a jury and a verdict

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returned for appellee, and, over a motion for a new trial, judgment was rendered against appellant.

Appellant assigns as error :

1. That the court had no jurisdiction of the person of the defendant.
2. The court had no jurisdiction of the subject-matter of the action.
3. The court erred in overruling appellant's motion to set aside the service of summons.
4. The court erred in sustaining the demurrer to appellant's plea to the jurisdiction of the court.
5. That the court erred in overruling the demurrer to each of paragraphs one, three, five and six of the complaint.
6. That the court erred in sustaining the demurrer to each of paragraphs one, two and three of the answer.
7. That the court erred in overruling the motion for new trial.

Appellant contends that the court below had no jurisdiction over the subject-matter of the action for this reason, that the injury was inflicted outside of the territorial limits of the State of Indiana, and within the State of Kentucky; that, therefore, section 284 (285), *supra*, has no application in this case; that the right of action, if any, must depend upon the laws of Kentucky and not upon the laws of this State. The theory of the defense is that this State has no jurisdiction over the Ohio river beyond low water mark on the Indiana side of the river. It is settled that low-water mark on this side of the Ohio river is the boundary line between this State and Kentucky. *Handly's Lessee v. Anthony*, 5 Wheat. 374; *Indiana v. Kentucky*, 136 U. S. 479; *Carlisle v. State*, 32 Ind. 55; *McFall v. Commonwealth*, 2 Met. (Ky.) 394.

It is provided, however, by an act of the common-

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wealth of Virginia, entitled “An act concerning the erection of the district of Kentucky into an independent State (passed December 18, 1789,) that the use and navigation of the Ohio river, so far as the territory of the proposed State or the territory which shall remain within the limits of this commonwealth lies therein, shall remain free and common to the citizens of the United States; and the respective jurisdiction of this commonwealth and of the proposed State, on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of said river.” Revised Laws of Virginia, Vol. 1, p. 59; 1 G. & H. p. 57; 3 R. S. 1894, p. 886.

In *Handly's Lessee v. Anthony*, *supra*, the supreme court of the United States referring to this act, by Marshal, Chief Justice, said that “The compact with Virginia under which Kentucky became a State, stipulates that the navigation of and jurisdiction over the (Ohio) river shall be concurrent between the new States * which may possess the opposite shores of the said river.”

This State has asserted this jurisdiction in section 2, article 14, of the constitution (Section 222, R. S. 1881; section 222, R. S. 1894), which declares that the State of Indiana “shall have concurrent jurisdiction in civil and criminal cases with the State of Kentucky on the Ohio river, and with the State of Illinois on the Wabash river so far as said rivers form the common boundary between this State and said States respectively.” The general assembly has assumed the same jurisdiction. 1 G. & H. section 93, p. 190, section 96, p. 191; sections 1578, 1579 and 4207, R. S. 1881; sections 1647, 1648 and 5544, R. S. 1894, R. S. 1843, p. 66.

It has been uniformly held by this court that the State possesses jurisdiction for the enforcement of the civil and criminal laws of the State on the Ohio river,

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where it constitutes the southern boundary of the State. Rorer Interstate Law, p. 343—4; *Carlisle v. State, supra*; *Dugan v. State*, 125 Ind. 130 (9 L. R. A. 321); *Welsh v. State*, 126 Ind. 71 (9 L. R. A. 664); *Sherlock v. Alling, Admr.*, 44 Ind. 184, and authorities cited. In *Sherlock v. Alling, Admr., supra*, a case like the one before us, this court held that section 284, R. S. 1881, (285), R. S. 1894, *supra*, was general and extended over all territory over which the State of Indiana has exclusive or concurrent jurisdiction, that it applies to cases where death is caused by wrongful acts or omissions on vessels while navigating the Ohio river where the same forms the boundary of this State. It is clear from the authorities cited, that this State had concurrent jurisdiction over the Ohio river at the point where it is alleged the death of appellee's intestate was caused by the wrongful acts of appellant. The only difference is that over the territory within the boundaries of the State the jurisdiction is exclusive, while on the Ohio river it is concurrent with Kentucky. It necessarily follows that the law which governs this case, including the service of summons and return, is the same as if the Ohio river was wholly within the State of Indiana, where it forms the southern boundary of the State. *Sherlock v. Alling, Admr.*, and authorities, *supra*.

Appellant further urges that the court below had no jurisdiction of the subject-matter of this action because appellee is not authorized to maintain an action for the death of her intestate under the laws of Missouri; that appellee is only accountable to the court that appointed her; that when the money is paid to appellee she takes it beyond the jurisdiction of the courts of this State, and within the jurisdiction of the probate court of Missouri for distribution in accordance with the laws of that State. This question was fully considered and decided

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adversely to appellant's contention in *Jeffersonville, etc., R. R. Co. v. Hendricks, Admr.*, 41 Ind. 48.

It is settled law in this State that the statute upon which this action is brought was intended to provide a remedy not only for the citizens of this State, but for the citizens of other states while passing through or residing within this State, and that such action may be maintained by a foreign administrator. *Jeffersonville, etc., R. R. Co. v. Hendricks, Admr., supra*. The fund, when recovered under this section of the statute, is held by the personal representative, whether domestic or foreign, as the trustee of an express trust; it must inure to the benefit of the widow and children, if any, and if not then to the next of kin. *Jeffersonville, etc., R. R. Co. v. Hendricks, Admr., supra*; *Dinnick v. Railroad Co.*, 103 U. S. 11. It would be an unjust reflection upon the courts of Missouri to say that when money recovered in such an action as this came into the hands of the administratrix charged with a trust of the most high and sacred character, they would not compel distribution as the law under which it was recovered directs.

Appellant insists that the court erred in overruling the motion to set aside the service of summons.

Section 316, R. S. 1881, which provides for service of summons upon corporations is as follows: "The process against either a domestic or foreign corporation may be served on the president, presiding officer, mayor, chairman of the board of trustees, or other chief officer (or, if its chief officer is not found in the county, then upon its cashier, treasurer, secretary, clerk, general or special agent); or, if it is a municipal corporation, upon its marshal; or, if it is an incorporated library company, upon its librarian; if none of the aforesaid officers can be found, then upon any person authorized to transact business in the name of such corporation; and if no such

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person, officer, or agent be found in the county where suit is pending, process may be sent, for service, to any other county in the State where such person, officer, or agent may be found: *Provided, however,* That process shall not be served upon any such person, officer, or agent when he is plaintiff in the suit, but, in such cases, process shall be served upon some other such person, officer, or agent of the corporation than such plaintiff; and in case the defendant be a foreign corporation, having no such person, officer, or agent resident in the State, service may be made in the same manner as against the other nonresidents."

Section 312, R. S. 1881, provides that in cases of non-residents or persons having no permanent residence in the State, action may be commenced and process served in any county where they may be found.

The summons was served on appellant by reading to M. M. Deem and Charles Vinton, and delivering to each of them a copy of the summons; at the time the same was read and the copies delivered to them they were on the steamboat "John K. Speed," and the boat was near the middle of the Ohio river, between low-water mark on the Indiana side and low-water mark on the Kentucky side of the river, but opposite Dearborn county, Indiana. At the time of service Deem was the captain and Vinton was first chief clerk of the boat "John K. Speed," one of the boats navigating the Ohio and Mississippi rivers, owned and controlled by appellant, said Deem and Vinton were respectively the captain and first chief clerk of said steamboat, and agents of the appellant for receiving freight and passengers for shipment and transportation by appellant, and for making contracts therefor, for and on account of said appellant, at the cities of Aurora and Lawrenceburg in Dearborn county, and at other points in the State of Indiana, and

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Vinton received for and transmitted money to appellant at said cities and at other points in the State of Indiana. The summons was also served on appellant by reading to John O'Tool, wharfmaster at the city of Lawrenceburg, and to Abraham Hill, the wharfmaster at the city of Aurora, at which wharfs said steamboat lands for receiving and discharging freight and passengers; and the sheriff's return on the summons states that "said O'Tool and Hill, being the agents of defendant at said Lawrenceburg and Aurora respectively, who received and discharged freight for defendant, and who made contracts at said cities for and on account of defendant for the shipment and transportation of freight, and who at said cities receive money for and transmit the same to defendant, said summons was served by reading the same to said O'Tool and Hill, and delivering to each of them a certified copy thereof, * * * there is no officer of said defendant in my bailiwick." Deem and Vinton were not residents of the State of Indiana. O'Tool resided at Lawrenceburg and Hill resided at Aurora.

The affidavits, so far as they relate to the service on O'Tool and Hill, are evasive, and do not state facts, but conclusions: They state that said O'Tool and Hill were not the agents, general, special, or otherwise, of appellant, but do not state that they were not authorized to transact business in the name of appellant, nor do the affidavits controvert the statement in the return, that O'Tool and Hill received and discharged freight for the defendant, and that they made contracts at the cities of Lawrenceburg and Aurora respectively for, and on account of, appellant, for the shipment and transportation of freight, and at said cities receive money for, and transmit the same to appellant.

We do not think the general statements and con-

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clusions set forth are sufficient to overcome the return of the sheriff. The same do not contradict, and cannot be considered as contradicting the return of the sheriff. We are of the opinion that the service on O'Tool and Hill was service on the appellant, under the statutes of this State, and gave the court jurisdiction over the person of the appellant. The appellant transacts business at all the cities, towns and landings in this State, on the Ohio river, and this State has concurrent jurisdiction over the Ohio river, navigated by appellant's line of steamers, where the same forms the southern boundary of the State.

The court did not err in overruling said motion. *Toledo, etc., R. W. Co. v. Owen*, 43 Ind. 405; *St. Clair v. Cox*, 106 U. S. 350; *Works Juris.*, 319-320..

This renders it unnecessary for us to determine concerning the service on Deem and Vinton.

What has been said disposes of the question presented by the fourth error assigned. The fifth error assigned calls in question the action of the court in overruling the demurrer to the first, third, fifth, and sixth paragraphs of complaint. As the sixth paragraph was abandoned by appellee at the trial, and the recovery had upon the other paragraphs, it is not necessary to consider that paragraph. The grounds of demurrer were:

1. That the court has no jurisdiction of the person of the defendant:

2. That the court has no jurisdiction of the subject-matter of the action:

3. That neither one of the paragraphs of complaint states facts sufficient to constitute a cause of action against defendant.

The questions presented by the first and second grounds of demurrer have already been determined.

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We do not think the objections urged to the complaint, under the third ground of demurrer, are tenable.

The fourth paragraph of answer was a general denial, and all the evidence that could have been given under the first, second and third paragraphs of answer could be given under the fourth; therefore, the error of the court, if any, in sustaining the demurrer to said paragraphs was harmless.

The first cause assigned for a new trial is that the verdict is not sustained by sufficient evidence. There is evidence which supports the verdict on every material point, and, under the firmly settled rule, this court will not reverse the case on the weight of the evidence. *Lawrence v. VanBuskirk*, 140 Ind. 481, and authorities cited.

The third reason for a new trial is that the damages assessed by the jury are excessive, and the fourth reason is that the assessment of the amount of recovery is too large. The damages were assessed at \$5,000.00. Under section 284, (285), *supra*, the damages may be assessed at any amount not exceeding \$10,000.00. A new trial cannot be granted for this reason, because the damages do not appear at first blush to be grossly excessive. *City of Evansville v. Worthington*, 97 Ind. 282; *City of Aurora v. Bitner*, 100 Ind. 396 (399); Thornton Ind. Prac. Code, note 16, p. 236.

The fifth reason for a new trial is error of law occurring at the trial of the cause, and excepted to at the time. It is claimed that the court erred in permitting appellee to give evidence as to the earnings of the deceased the last year or two of his life. The bill of exceptions does not show that any exception was reserved to this ruling of the court, and this question is, therefore, not in the record.

Appellant offered to prove, by one Cowlshaw, a competent witness, while on the stand, that the class of

men usually employed on steamboats as rousters are quarrelsome, violent, and a fighting class of people, which offered evidence was excluded by the court.

We are unable to see how such evidence would avail appellant in this case. If appellant, a common carrier negligently employed a quarrelsome, violent, and fighting crew, and a passenger is injured on that account, under the circumstances set forth in the complaint, without fault on his part, it would be no defense that the class of men usually employed on steamboats was of that class.

Appellee, on the trial, read to the jury the depositions of three witnesses taken by her. When appellee was about to read the cross-examination, appellant objected, stating to the court, as the reason therefor, "that the cross-examination was testimony for defendant, and as such is controlled by the defendant, the same as if the witnesses had testified from the stand, and defendant had refused to cross-examine them. It is optional with the defendant to have the cross-examination of the witness read to the jury." This objection the court overruled, and permitted the cross-examination of the witnesses to be read to the jury. This ruling of the court below was correct. The depositions had been taken on behalf of appellee, appellant had attended the taking of the depositions, and cross-examined the witnesses, and could no more prevent, by objection, the cross-examination being read at the trial, than it could ask the court to strike out, and direct the jury to disregard, evidence given on cross-examination of a witness at the trial of the cause.

Appellant claims that the court erred in suppressing questions and answers of the depositions of divers witnesses on motion of appellee, and in refusing to suppress questions and answers of the depositions of divers wit-

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nesses on motion of appellant. The brief of appellant does not refer to any page or line of the transcript where any such rulings were made by the court, and under the long and well-settled practice of this court, the questions arising upon such rulings, if any, are waived.

Another cause assigned for a new trial is that the court erred in giving instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, asked by plaintiff, to the jury.

Another cause assigned is that the court erred in refusing to give thirty instructions, giving the number of each, asked by defendant, to the jury.

It is not claimed by appellant that there was error in either giving each instruction asked by appellee, or in refusing to give each instruction asked by appellant. Some of those given are admitted to be correct by a failure to point out any objection thereto, and some of those refused are admitted to have been properly refused by a failure to show in what respect the court erred in its refusal to give the same.

To render the first of these specifications available as a cause for a new trial, all the instructions named in such specification must be incorrect, and to render the specification as to the thirty instructions available as a cause for a new trial, all such instructions must be correct. *Lawrence v. VanBuskirk, supra*, and authorities cited.

Appellant has no cause to complain of the court's modifying instructions 9, 11, 13, 18, and 21, asked by appellant, and giving them, as modified, to the jury.

Instruction 21, as asked, was clearly erroneous. It was the province of the jury, and not of the court, on the facts as stated in the instruction as asked, to determine whether or not the deceased was guilty of contributory negligence. If error was committed in giving

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instruction 21 as modified, it was in favor of appellant, and one of which appellant would have no right to complain.

There is no available error in the record.

Judgment affirmed.

Filed April 25, 1895; petition for rehearing overruled October 17, 1895.

NOTE.—As to the liability of a master for assaults by servants, including the matter of assault upon a passenger, see note to *Davis v. Houghtelin* (Neb.), 14 L. R. A. 737; also, *Atchison, T. & S. F. R. R. Co. v. Henry* (Kan.), 29 L. R. A. 465, and cases there referred to, as well as *Goodloe v. Memphis & C. R. R. Co.* (Ala.), 29 L. R. A. 729.

No. 17,125.

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142 318
148 186
150 292
152 680

APPELLATE PROCEDURE.—*Excluded Evidence.*—*Question, How Saved.*—An objection to the overruling of a question is not available upon appeal, unless an offer or statement of what was proposed to be proved was made.

EVIDENCE.—*Erroneous Admission of.*—*Withdrawal.*—*Error Cured.*—*Appellate Procedure.*—Error in the admission of improper evidence is cured by a complete withdrawal of it from the jury, and an explicit direction to disregard it, where the party complaining does not show that in spite of its withdrawal, and the admonition to disregard it, the erroneous evidence prejudiced him with the jury.

SAME.—*Relevancy.*—*Agency.*—Evidence, the relevancy of which is dependent upon the existence of an agency, may be admitted upon the express undertaking of the party offering it to disclose the relation of agency, where some evidence has already gone to the jury, tending to establish such agency.

INSTRUCTION TO JURY.—*Sale.*—*Real Estate.*—*Misrepresentations.*—*Inspection.*—*Deceit.*—An instruction that a purchaser has no right to rely upon the seller's representations as to quality of land, where he has a reasonable opportunity to examine and judge for himself, is not erroneous because it does not contain the condition that the

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defects complained of were such as an examination would have disclosed—especially where the jury are further instructed that the seller could not defeat a recovery for his fraud by showing an inspection, if such an inspection would not disclose the deceits practiced, or if by fraud the purchaser was induced to be less vigilant in his inspection.

From the Parke Circuit Court.

Hurley & Clodfelter, M. D. White and L. J. Coppage, for appellant.

Wright & Seller, and Crane & Anderson, for appellee.

HACKNEY, J.—The appellant sued the appellee, in the circuit court, for the recovery of five thousand dollars damages alleged to have been sustained in the exchange of certain real estate in Crawfordsville, for a farm in Illinois. The theory of the suit was that the alleged false and fraudulent representations of the appellee as to the quality and value of the farm had deceived the appellant to his injury in said sum. All of the questions for our consideration arise upon the action of the trial court in overruling the appellant's motion for a new trial. As tending to prove an allegation that the farm was not as productive as represented, the appellant was asked, as a witness, to state what he had received from the place each year. The appellee's objection was sustained and no offer or statement of what was proposed to be proven was made. No question, therefore, is properly presented. *Wright v. Fulz*, 138 Ind. 594; *Smith v. Gorham*, 119 Ind. 436; *Higham v. Vanosdol*, 101 Ind. 160; *Judy v. Citizen*, 101 Ind. 18; *Baltimore, etc., R. R. Co. v. Lansing*, 52 Ind. 229; *Adams v. Cosby*, 48 Ind. 153; *Lewis v. Lewis*, 30 Ind. 257; *City of Evansville v. Thacker*, 2 Ind. App. 371.

On motion of the appellee, the court struck out cer-

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tain parts of the appellant's evidence of the appellee's representations as to the market value of corn and oats in the markets near said farm. In this ruling there was no error, since no issue was presented by the pleadings as to any such representations.

The trial court admitted evidence, from the appellee, of the character, condition, and location of the Crawfordsville property, as tending to establish its value, and in addition permitted direct evidence of its value. This evidence was admitted over the objection of the appellant, and was thereafter, and before the close of the evidence, withdrawn from the consideration of the jury by the direction and admonition of the court as follows: "Gentlemen of the jury: All of the testimony in the case, given on either side, in reference to the actual value of the Crawfordsville property at the time of the trade in question, and at any time during the negotiations concerning the trade, is withdrawn from the jury—concerning the actual value—there is no reference now, as to what was the agreed price. You are directed to give such testimony no consideration whatever." There having been evidence also, of the agreed price at which said property was considered in the trade, the court manifestly discriminated between the agreed price, and the actual value, excluding the latter from consideration, but retaining the evidence of the agreed price. All of the evidence, as to said property, to which objection was urged, and exception reserved, had reference to the actual value as distinguished from the agreed price, and the action of the court in withdrawing the evidence of actual value was fully as broad as the evidence objected to. While it is argued that the withdrawal did not cover the entire evidence upon the subject, it is insisted also, that the admission of the evidence was such prejudicial error that it could not be

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withdrawn. It has been frequently held, in this State, that evidence erroneously admitted may properly be withdrawn by the court. *Zehner v. Kepler*, 16 Ind. 290; *Adams v. Dale*, 38 Ind. 105; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Wishmier v. Behymer*, 30 Ind. 102; *Gebhart v. Burkett*, 57 Ind. 378; *Moore v. Shields*, 121 Ind. 267; *Blizzard v. Applegate*, 77 Ind. 516; *Evansville, etc., R. R. Co. v. Montgomery*, 85 Ind. 494; Elliott App. Proced., section 701; *Pennsylvania Co. v. Roy*, 102 U. S. 451 (457.)

In the present case the withdrawal was complete, and the direction to disregard it was explicit, and, under the authorities cited, the error, if any, was fully cured. If the effect of the erroneous evidence were such as to prejudice the jury against the cause of the appellant, notwithstanding its withdrawal and the admonition to disregard it, the burden would rest upon the appellant to establish such prejudice, and this court will not presume, as counsel insist, that the evidence so withdrawn prejudiced the jury against his cause. Elliott App. Proced. 701 and 702; *Pennsylvania Co. v. Roy*, *supra*.

The appellant complains further of the admission of certain evidence of statements made by, and to, the appellant's wife, concerning the character of the farm. No question is made against the relevancy of the evidence, if the wife was the agent of the appellant in the negotiations. The court admitted the evidence upon the express undertaking of the appellee to disclose the relation of agency, some evidence having already gone to the jury tending to establish such agency. Considering the whole of the evidence which was favorable to the existence of an agency, we are of opinion that, *prima facie*, an agency was established. Though all of the evidence essential to the establishment of an agency had not been given in advance of the statements objected to,

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there was no available error in admitting them. *Rowell v. Klein*, 44 Ind. 290.

It is insisted that the court erred in giving the following instruction: "A purchaser of property has no right to rely upon the representations of the vendor, or seller of the property as to its quality, where he has a reasonable opportunity of examining the property, and judging for himself as to its qualities." The objection urged against this charge is that it should have contained the following qualification or condition: "If the defects complained of as constituting the fraud were such as an examination of the property would have disclosed."

The charge given was a correct statement of the law. *Cagney v. Cuson*, 77 Ind. 494; *Hunt v. Blanton*, 89 Ind. 38.

"A reasonable opportunity of examining and judging" might fairly be held to include all that is contained in, or implied from the condition urged as necessary to the sufficiency of the charge. However, it is questionable whether the appellant's remedy was not to have asked a fuller instruction. Elliott App. Proced., sections 647, 736, and cases cited.

The same objection is made to other charges given, and the decision made applies to such with equal force. The objection, as to each of said instructions, is not available for the further reason that the court, in its fifth charge, told the jury that the vendor could not defeat a recovery by showing an inspection of the land, if it appeared that an inspection would not disclose the deceit in the alleged false representations, or if by fraud the purchaser was induced to be less vigilant in his inspection.

Finally it is complained that the court modified two instructions asked by appellant. The instructions had relation to the character of representations constituting

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fraud, and necessary to a recovery, and the modifications consisted of statements to the effect that the representations must be such as the appellant "had a right to rely upon." Former instructions had indicated certain representations, and representations under certain conditions which the appellant had no right to rely upon. In view of the former instructions the phrase objected to must be held to have reference to the class of representations pointed out as not to be relied upon. While no definition of the phrase is given in express terms, it is quite clear, considering the charges all together, as we must, that the representations upon which the appellant had the right to rely should be other and different from those where it had been expressly directed that there was no right to rely.

Finding no available error in the record, the judgment of the circuit court is affirmed.

MCCABE, J., did not participate in this case.

Filed January 16, 1895 ; petition for rehearing overruled October 16, 1895.

No. 17,020.

THE *ÆTNA LIFE INSURANCE COMPANY OF HARTFORD,*
CONNECTICUT, ET AL. *v.* BENSON.

APPELLATE PROCEDURE.—*Dismissal of Appeal.—Superior Court.—*

Record.—An appeal to the supreme court, from a judgment of the superior court at general term, affirming a judgment of such court at special term, will be dismissed, where the record does not disclose what judgment, if any, was entered at special term.

From the Marion Superior Court.

Ayres & Jones and *A. T. Beck*, for appellants.

Galloway *et al.* v. Campbell.

R. N. Lamb and R. Hill, for appellee.

HOWARD, C. J.—This is an appeal from a judgment of the general term of the Marion Superior Court, affirming a judgment of said court at special term. The record, however, fails to disclose what judgment, if any, was entered at special term. A finding of facts, with conclusions of law in favor of appellee is shown; but the judgment, if any there were, does not appear. We are therefore unable to determine whether the judgment of the court at general term was correct or not, inasmuch as an appeal to the general term could be taken only from a final judgment at special term, which final judgment should be set out in the record. *Northcutt v. Buckles*, 60 Ind. 577; *Wingo v. State*, 99 Ind. 343; *Gray v. Singer, Admr.*, 137 Ind. 257; Elliott App. Proced. sections 81, 96; Elliott Gen. Prac., sections 1015, 1018, 1035, 1056. There is therefore no question presented for our consideration.

The appeal is dismissed.

Filed May 28, 1895; petition to reinstate overruled, October 16, 1895.

No. 17,404.

GALLOWAY ET AL. v. CAMPBELL.

RECEIVER.—Nonresident Plaintiff.—Overruling Motion for Bond for Costs.—An appointment of a receiver upon the application of plaintiff is not invalid because of the erroneous overruling of a previous motion by defendant to require plaintiff as a nonresident to file a bond for costs, under section 598, R. S. 1894.

SAME.—To Operate Oil Wells Pending Action for Specific Performance.—Nonresident Defendants.—The appointment of a receiver to operate oil wells pending an action for the specific performance of

142	324
142	527
142	324
150	284

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a contract to assign a lease is authorized, where defendant, who is a nonresident without property in the State, save the machinery on the land, is operating the wells and selling the product.

From the Wells Circuit Court.

A. L. Sharp and *C. E. Sturgis*, for appellants.

C. W. Kinnan, *L. Mock* and *A. Simmons*, for appellee.

HOWARD, C. J.—This is an appeal from an order appointing a receiver to take charge of the oil produced from certain oil wells, and to take care of and superintend the production of the same, under the terms of a grant or lease, the ownership of which is in controversy between the parties.

The original action was for specific performance, brought by the appellee to require the appellants to assign to him said grant or lease for oil and gas, and the right to operate therefor, in and under certain lands described in the complaint, in pursuance of the terms of an alleged contract.

From the verified application for the appointment of a receiver, which was filed by the appellee in vacation of court, it appears that the appellants have possession of the land in question, and by their employes have sunk one well thereon and are preparing to sink others; that the well now operated produces daily thirty barrels of oil, which is run into a tank for the purpose of being shipped and sold; that the appellants are nonresidents of the State and have no property therein, save the machinery upon said land, and if they are permitted to sell or dispose of the oil taken from the wells the appellee will suffer irreparable injury.

There was an answer to the application; and numerous affidavits were filed for and against the appointment.

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It was for the judge to whom the application was made to determine the probable facts from these several pleadings and affidavits. If the statements in the complaint and application, and in the affidavits in their support, are correct, it would seem that the appointment was justified.

In case the claim made by the appellee to the oil and gas, and the right to operate therefor, should be established, it might be that without a receiver to care for the oil or gas and the proceeds of its sale, great loss would be occasioned to appellee, if, as said by him, the appellants are nonresidents and are without property in the State.

Neither of the parties owns or claims to own the land from which the oil is taken, but only the grant or lease of the right to take oil or gas therefrom.

In *McCaslin v. State, ex rel.*, 44 Ind. 151, quoting from the statute (Cl. 3, section 1236, R. S. 1894 ; section 1222, R. S. 1881), which authorizes the appointment of a receiver "in all actions when it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured," the court said: "There seems to be no room to doubt that the cutting down and removing of valuable timber from the land in controversy, and especially where the defendant only claimed the title and possession of such land under a title bond, the purchase-money being unpaid, and it being alleged and proved that the defendant was insolvent, would be such material injury as would justify the court in appointing a receiver to take charge of and preserve such land during the litigation."

In *Bitting v. Ten Eyck*, 85 Ind. 357, which was an action in ejectment, the appointment of a receiver "to take charge of and sell the crops on the land, and hold the proceeds under the order of the court," was approved. In that case it was said by Woods, J., that "the appoint-

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ment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it. * * * The principle, in ordinary practice, is to appoint a receiver with the sole view of preserving the property and not to inquire into the merits."

In *Hellebush v. Blake*, 119 Ind. 349, it was held that a court may appoint a receiver to take charge of personal property in litigation and within its jurisdiction.

In the case at bar, the action was concerning the ownership of a grant or lease of the right to mine and dispose of certain gas and oil; and the receiver was appointed to take charge of the oil and the production and sale of the same.

The judge, in making the appointment, is presumed to have acted on the truth of the statements made in the application and affidavits of the appellee; and, therefore, and in view of the foregoing authorities, we cannot say that the appointment of the receiver was not proper. The case seems to be one showing "the peculiar and urgent circumstances," named in 5 Wait's Actions and Defenses, 355, as necessary to justify the appointment of a receiver.

It is also claimed as error that the judge overruled a motion to require the appellants, as nonresidents, to file a bond for costs.

We are inclined to think that this motion should have been sustained, inasmuch as a bond for costs should be filed by a nonresident before the bringing of his action (section 598, R. S. 1894; section 589, R. S. 1881). We are not of opinion, however, that for this reason the appointment of the receiver was invalid. The bond for costs should be filed in the case itself, and not simply as a condition to the appointment of a receiver; and the

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penalty for the refusal to file such a bond is a dismissal of the case.

The statute (section 1236, R. S. 1894 ; section 1222, R. S. 1881) *supra*, fixes the conditions for the appointment of a receiver. These conditions, including the filing of a receiver's bond, were complied with in the case before us.

The judgment is affirmed.

Filed October 17, 1895.

No. 17,138.

GOWEN ET AL. v. GILSON ET AL.

PLEADING.—*Filing Amended Pleading.*—*Waiver.*—The filing of an amended pleading waives any error in sustaining a demurrer to the original pleading.

From the Lawrence Circuit Court.

Duncan & Batman and *J. A. Zaring*, for appellants.

HACKNEY, J.—The only assignment of error in this case is upon the action of the lower court in sustaining the appellees' demurrer to the appellants' complaint. The record discloses that after the ruling upon demurrer to the complaint the appellants filed an amended complaint upon which further steps were taken. That the filing of an amended pleading takes out of the record the original pleading and waives any error in the ruling upon such original pleading is well settled. *Kennedy v. Anderson*, 98 Ind. 151 ; *Conley v. Dibber*, 91 Ind. 413 ; *State, ex rel., v. Hay*, 88 Ind. 274 ; *Berghoff v. McDonald*, 87 Ind. 549 ; *Eshelman v. Snyder*, 82 Ind. 498 ; *Miles v. Buchanan*, 36 Ind. 490 ; *Johnson v. Conklin*, 119 Ind. 109 ; *Earp v. Commissioners, etc.*, 36 Ind. 470 ; *Aiken v.*

142	328
143	260
142	328
147	305
142	328
152	575
142	328
164	215

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Bruen, 21 Ind. 137; *Patrick v. Jones*, 21 Ind. 249; *Elliott App. Proced.*, sections 595, 683. The record presenting no available error, the judgment of the circuit court is affirmed,

Filed October 18, 1895.

No. 17,458.

BEATTY v. COBLE.

CONTRACT.—*In Restraint of Practice of Medicine.*—*Construction.*—

Territory.—A stipulation that in consideration of the purchase of a physician's property, the seller will, within a reasonable time, leave the field of practice, implies an agreement that he will not thereafter practice in the territory named.

SAME.—*In Restraint of Practice of Medicine.*—*Consideration.*—

Separate Property of Wife.—That a house in consideration of the purchase of which a husband covenanted to retire from the practice of medicine in a specified territory was the separate property of his wife, who received the entire consideration therefor, and was built for and used as a residence, and not as a physician's office, does not relieve him from his covenant.

SAME.—*Against Practice of Medicine.*—*Consideration.*—*Injunction.*—

The adequacy of the consideration of a contract not to engage in the practice of medicine within a specified territory, will not be inquired into in an action for an injunction against the obligor, but it is sufficient if some legal consideration appear.

APPELLATE PROCEDURE.—*Dismissal of Appeal.*—*Injunction.*—

Contract Against Practice of Medicine.—An appeal from a judgment for defendant, in the action to enjoin him from practicing medicine in a specified territory under a covenant not to practice therein, in consideration of a purchase of property by the covenantee, will not be dismissed because during its pendency the appellant has located and is practicing medicine in a territory reaching to portions of the appellee's former field of practice.

From the Owen Circuit Court.

I. H. Fowler and T. G. Spangler, for appellant.

142	329
142	563
142	329
145	35
142	329
155	542

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W. Hickam, for appellee.

MCCABE, J.—The appellant and appellee are practicing physicians and surgeons.

The appellant sued the appellee to enjoin him from a violation of the following contract.

“SPENCER, IND., November 2, 1891.

“Whereas, I am contemplating removing from Spencer; and, whereas, William H. Beatty, a practicing physician of Morgan county, is desirous of locating in Spencer, Indiana; now, therefore, in consideration of the purchase of my property by said William H. Beatty, I hereby agree that within a reasonable time, and as soon as I can arrange my business and conveniently leave my said field of practice, I will retire from the practice of medicine and surgery at Spencer, Ind.

“JACOB COBLE.”

There was a demurrer for want of sufficient facts overruled to the second paragraph of the answer. A trial of the issues formed resulted in a finding and judgment for the defendant, over appellant's motion for a new trial.

Error is assigned on the action of the court in overruling said demurrer, and in overruling the motion for a new trial.

The sufficiency of the complaint is called in question by the appellee, as he may do in his defense of the ruling on the demurrer to the second paragraph of the answer, as a bad answer is good enough for a bad complaint. Appellee also questions the sufficiency of the complaint by assigning for cross error that the circuit court erred in overruling a demurrer thereto, for want of sufficient facts.

The material facts alleged in the complaint are that both parties were practicing physicians and surgeons,

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the defendant in Spencer, Indiana, and the plaintiff in Morgan county, Indiana; and in consideration that plaintiff would purchase of said defendant his residence in Spencer, in Owen county, Indiana, for the sum of \$1,500, said defendant agreed with plaintiff that he would leave his field of practice, which was co-extensive with said county, and retire therefrom and leave the same to the plaintiff, making the written contract, above set out, an exhibit and a part of the complaint; that, in pursuance of said agreement, he did purchase of said defendant said property for \$1,500, and paid said defendant said sum; that said contract was entered into and said purchase made with the design and intention of plaintiff engaging in the practice of his profession at said town of Spencer, and in the former field of practice of said defendant, and without having the competition of said defendant therein; that defendant did, within a reasonable time thereafter, to-wit: August 15, 1892, retire from his field of practice at said town of Spencer, and did remove from said town and county to a distant part of the State. That plaintiff has ever since been engaged in the practice of his profession, and is now so engaged in the former field of practice of said defendant, but that defendant, wholly disregarding his said contract and agreement with said plaintiff, and in violation thereof, did on February 1, 1894, remove back to the town of Spencer, and opened an office, and has ever since been engaged in the practice of his profession at said town of Spencer, and in his former field of practice; that such violation of said contract is likely to, and will, result in great and irreparable damage to plaintiff in his future practice, the defendant being wholly insolvent; that the plaintiff has duly performed all the conditions of said contract. Prayer for an injunction.

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The objection urged to the complaint is that the contract on which it is founded contains no express provision that the appellee shall not afterwards resume his practice, as formerly.

Appellee's counsel cite us to many authorities in support of this objection, the substance of all of which is summed up in one of them, namely: High on Injunctions, section 1169. It is there said: "Some conflict of authority exists upon the question whether, in the absence of an express agreement against resuming business in a given locality upon the sale of a business with its good will, equity should interfere by injunction to prevent defendant from so resuming. The better doctrine, however, is that to warrant a court of equity in interfering by injunction in such cases, there must be an actual contract, and the court will not imply a covenant on the part of one who sells the good will of a trade or business not to carry on the same trade or business in that locality. It follows, therefore, that where one has sold the good will of his trade without any express covenant, preventing him from resuming the trade in that vicinity, he will not be enjoined from resuming it."

It will be found that this principle is the outgrowth of sales of stock in trade in an established house or place of business, with the good will of customers, in the habit of doing business at that place.

In such a case the sale of the stock in trade and entire business, with the good will attached, puts an end to the business of the seller, at least for the time being, without any other agreement or stipulation than the transfer of the property, both tangible and intangible.

It had often been contended that such a sale carried with it an implied agreement that the seller would not resume the same business, or again engage therein, in that locality, and thereby take away from the purchaser

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that which he had sold to him, the good will of the habitual customers of such business.

It finally became settled that the mere sale of the goods, stock in trade and good will attached, without any express stipulation, not to resume or again engage in the business in that locality, on part of the seller, were not sufficient to warrant a court of equity in restraining the seller from again engaging in such business in the same locality. 10 Am. & Eng. Ency. Law, 945-947, and authorities there cited; 3 Pars. Conts. 368; Waterman Specif. Perf., section 35; *Ransom v. Pratt*, 91 Ind. 9; *Beard v. Dennis*, 6 Ind. 200; High Inj., sections 1169-1180; *Eisel v. Hayes*, 141 Ind. 41.

But the contract before us, aside from the stipulation in relation to leaving and retiring from appellee's field of practice, caused no interruption of his business, as in case of a sale of an entire stock in trade.

That contract must be construed or interpreted from the language employed therein, and from the circumstances surrounding the contracting parties, and thus get at their intention, as expressed in the instrument.

It is conceded by the appellee, that the express stipulation of the contract required him to retire from the practice at Spencer. But he thinks a good faith retirement for a year and a half was a sufficient compliance with that stipulation. So that both parties construe the contract to be and contain an express agreement by appellee to leave and retire from that field of practice.

The plain meaning and import of that is that the appellee agrees not to engage in the practice in that field, without limitation as to time. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109. The want of such definite limit is no objection to such a contract. *Eisel v. Hayes*, *supra*.

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If that express stipulation is complied with by a good faith retirement for eighteen months, then it would be complied with by one month's retirement, and if one month, then one day, or even a shorter period. So that it is clear that such a construction destroys the stipulation entirely, and defeats the expectation and intent of both parties.

Contracts should be so construed as to uphold, rather than defeat them. *Irwin v. Kilburn*, 104 Ind. 113.

The stipulation here means that the appellee will not practice his profession in the territory named. Such contracts have been uniformly enforced by injunction. *Cook v. Johnson*, 47 Conn. 175; *Mallan v. May*, 11 M. & W. 653; *Clark v. Crosby*, 37 Vt. 188; *Smalley v. Greene*, 52 Iowa 241; 10 Am. & Eng. Ency. Law, 945-946, and authorities there cited.

It is contended that the complaint is bad, because it does not disclose an adequate consideration. It seems to be the settled law now in such cases, that the adequacy of the consideration will not be inquired into. It is sufficient if some legal consideration appears. *Duffy v. Shockey*, 11 Ind. 70; 22 Am. Law Rev., 887-888, and authorities there cited; *Eisel v. Hayes*, *supra*; *Greenhood Pub. Policy*, 718, 719, and authorities cited.

The complaint was therefore sufficient.

The material facts alleged in the second paragraph of the answer are that the appellee, at the making of said contract, was not the owner of the property conveyed to the plaintiff, but the same was the sole and separate property of defendant's wife, Marietta Coble, which was built for, and used as, a residence, and not a physician's office, and no part of the consideration for said conveyance was ever received by defendant, and that no consideration ever passed between plaintiff and defendant for the execution of the agreement sued on.

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This pleading does not state facts enough to show a want of consideration, for which it was evidently and confessedly pled. *Koh-i-moor Laundry Co. v. Lockwood*, 141 Ind. 140 (40 N. E. 677), and authorities there cited.

A motion to dismiss this appeal on the ground made to appear in affidavits, that since the appeal was taken, the appellant has located in the town of Worthington, in Greene county, to practice his profession, which reaches into portions of Owen county, the appellee's former field of practice, in which parts appellant still continues to practice. These facts do not deprive the appellant of the right to continue to prosecute his appeal. No authority is cited to support the motion, and we know of none.

The circuit court erred in overruling the demurrer to said answer.

The judgment is reversed, with instructions to sustain the demurrer to the second paragraph of the answer.

JORDAN, J., took no part in this decision.

Filed October 18, 1895.

No. 16,456.

JONES, TREASURER, ETC., v. CULLEN.

COUNTY COMMISSIONERS.—*Order Granting Aid to Railroad Company. —Irregular Session.—Void.—Collateral Attack.—Injunction.*—An order of the board of county commissioners granting aid to railroad companies by townships within the county, of which matter such board has exclusive original jurisdiction, will not be held void on collateral attack on the ground that the meeting at which such order was made was irregular, where all the members of the board were present at the place provided by law for their meeting, and at a time when they could have convened in special session upon call.

142	335
140	640
141	88
141	671
142	369
142	335
145	74
147	503
142	335
148	436
152	577
142	335
153	241
153	688
142	335
154	238
155	490
156	39
156	269
142	335
157	176
142	335
159	572
142	

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142	335
163	450
163	450

142	335
166	657
167	123

142	335
149	644

142	335
171	354

SAME.—*Order Granting Aid to Railroad Co.—Action to Set Aside.—*

Laches.—An order of the board of county commissioners granting aid to a railroad company will not be set aside at the instance of one who waits three years before seeking relief, and until the railroad company, in consideration of the donation, has expended money in the construction of the road.

From the Marion Superior Court.

B. K. Elliott and W. F. Elliott, for appellant.

A. C. Harris, W. A. Cullen and J. D. Megee, for appellee.

JORDAN, J.—This was an action commenced by the appellee, in the circuit court of Rush county, on the 16th day of February, 1891, to enjoin appellant, as the treasurer of that county, from collecting a tax levied upon the lands of appellee and others, to aid in the construction of the Cincinnati, Wabash and Michigan Railway.

Upon a change of venue the cause was tried in the Marion Superior Court, and resulted in a judgment perpetually enjoining appellant from collecting the tax in question, and adjudging the same to be null and void. The following from the record appears to be a correct summary of the facts in the cause:

On March 30, 1887, a petition in due form signed by twenty-five freeholders and over, of the township, in accordance with section 4045, R. S. 1881, and section 5340, R. S. 1894, was presented to the board of commissioners of said county, asking an appropriation of fifty thousand dollars as a donation to said railway company. Said petition was acted upon by the board, and an order made on that day fixing the 4th day of May, 1887, for an election to enable the voters of the township to decide whether the donation should be made. The election was held pursuant to the order, and resulted in a majority of the votes being cast for the appropriation.

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At the regular June term, 1887, a return of said election was made to the board, and the donation of said sum to the railway company was made; and, for the purpose of raising the sum donated, a special tax of one per cent. upon the real and personal property of the several owners thereof, in the township, subject to taxation for State and county purposes for the year 1887, was levied by the board, to be collected as other taxes; and the auditor was directed to levy and assess upon the tax duplicate to the several owners of real and personal property therein, a tax of one per cent. for the year 1887, to raise a part of said sum voted and donated as aforesaid. The residue thereof, not to exceed one per cent. was ordered to be levied and assessed in the same manner, at the ensuing June session, 1888, of said board. The collection of said levies and assessments was ordered suspended until the further order of the board.

No further proceedings were had in the matter until the 17th day of June, 1890, when the board, as recited in the record entry then made, on account of said railway company having resumed the prosecution of its work in the township, and being engaged in prosecuting it to a speedy completion, revoked and set aside its said order of suspension of the collection of the taxes, and directed the auditor of said county to assess and apportion to the several owners of real and personal property subject to taxation in the township for the year 1887, a tax of one per cent. to raise the sum of \$23,224.95, and to assess and apportion the residue of said donation, or so much thereof as not to exceed one per cent. upon the taxables, to the several owners of real and personal property subject to taxation in the township, as shown upon the tax duplicate for the year 1888; said taxes to be collected by installments in like manner as are State and county taxes.

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The auditor complied with the order of the board, and the amount assessed and charged against the lands and lots of appellee amounted to \$306.00, which amount appellant threatens to enforce against the property of the former.

Appellee was, on March 30, 1887, the owner of the lands and lots upon which the railroad tax has been levied, but did not join in the petition heretofore mentioned. The proper notice for the election was given by publication, in two papers of general circulation, printed and published in Rushville, the county seat, and also by the distribution of printed hand-bills.

The errors presented and argued by the learned counsel for appellant, are upon the action of the court in overruling the demurrer to certain specifications of the complaint, and in overruling a motion for a new trial. The complaint is quite voluminous, and contains eleven specifications. It and each of its specifications were assailed by a demurrer, which was overruled to the 1st, 2nd, 4th, 7th, 8th, and 9th, and sustained to the others.

In actions of the character like the one at bar, it is the proper practice as recognized by the decisions of this court, to demur to each specification. Each is considered as a separate paragraph, and must be good within itself, and one can lend no aid in upholding the other. *Hilton v. Mason, Treas.*, 92 Ind. 157, and cases cited; *Hill v. Probst, Treas.*, 120 Ind. 528.

The first and second specifications are the essential ones in the case, and are so considered by the appellant and appellee herein, and they are substantially as follows: "Plaintiff says that the tax so pretended to be levied and charged against him and his said property is absolutely null and void for the following reasons:

"First—The pretended meeting of the board of county

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commissioners on the 30th day of March, 1887, and all business pretended to be transacted by them, was wholly illegal and void for the reason that the board was not in general session, the law prescribing another and different time for the regular meeting of boards of commissioners in counties wherein the population exceeds ten thousand and does not exceed thirty thousand; and was not legally in special session because no notice was given to the members of the board, or to any of them, by the auditor of Rush county, that said board would meet in special session on the said 30th day of March, or on any previous day from which the board had adjourned to that day, nor by any officer of Rush county, authorized by law to give such notice, nor was the board at any time in special session pursuant to a notice of the county auditor or any officer of Rush county between the termination of the regular March session, and the said 30th day of March, 1887; and that said board only pretended to be in session on the 30th day of March, pursuant to an adjournment order entered of record on the 16th day of March, 1887, at which time they were not in special session pursuant to any notice from the auditor of Rush county, or any other officer authorized by law to give such notice; that no notice whatever was served or given to the members of said board, or to a majority of said members, to meet in special session on the 30th day of March, or any previous day, between the end of the regular session, and the said 30th day of March, at which time the petition of M. Sexton, and others herein set out, was presented to said board, and the order made by said board ordering the election in said Rushville township, appropriating the sum herein set out to the Cincinnati, Wabash and Michigan Railway Company.

“Second—That the pretended proceedings above set

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out of date, June the 17th, 1890, are null and void, for the reason that the said commissioners' court of said county was not on said day either in regular or special session, and the proceedings so had on said day are null and void ; and the auditor had no authority to compute or charge against this plaintiff or his property the said tax so by him afterwards done, or any part thereof ; nor has the treasurer any authority in law to enforce the collection thereof, against him or his said property or any part thereof."

The principal contentions of appellant, and the only ones which we deem necessary to set out in this opinion, are as follows :

"First—Where the members of a tribunal, such as the board of commissioners in this State, may convene in session upon notice from a ministerial officer, and they do assemble in session and transact business as if convened in due form of law, their judgments are not void.

"Second—Where there is authority to convene upon notice, and the sessions of the tribunal are not confined to times fixed by positive law, the tribunal in convening in session necessarily adjudicates upon its own organization, its own authority to hold the session, as well as upon all other jurisdictional facts, and its judgment is not vulnerable upon a collateral attack, however erroneous it may be.

"Third—The board of commissioners not only had jurisdiction of the general subject, but it had, also, exclusive original jurisdiction of the whole subject, so that its decision as to its authority to hold the special session is that of a permanent tribunal of exclusive original jurisdiction, and hence not vulnerable to a collateral attack.

"Fourth—The special session was held by rightful

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members of the tribunal, and not by intruders and usurpers. And as there is no time fixed by law for holding special sessions, but such sessions may be held upon notice, the judgment of the board upon the validity of its session is conclusive.

“Fifth—That there is no equity shown in the action, and therefore no right to an injunction.”

Upon the other side the learned counsel for appellee contend that the board of commissioners on March 30, 1887, when the petition in controversy was presented to that body, and also on June 17, 1890, when the tax was ordered to be placed upon the duplicate, was not in regular session nor in special session by virtue of section 5737, R. S. 1881 (section 7822, R. S. 1894), and therefore their acts in the premises are void, and consequently the tax in question is a nullity, and the collection thereof should be enjoined.

It is evident, we think, that the theory of the complaint, when considered with reference to the first and second specifications, is that the orders of the board of commissioners, made and entered on March 30, 1887, and June 17, 1890, are null and void for the reason that no notice was given to the individual members of the board, by any of the officers mentioned in section 5737, *supra*; that they convened and assumed to act as a board of their own volition, and not otherwise; and that consequently the complainant was entitled to injunctive relief. It is firmly settled that the court will construe the complaint as proceeding upon the theory which is most apparent and most clearly outlined by facts alleged. *Batman v. Snoddy*, 132 Ind. 480; *Monnett v. Turpie*, 132 Ind. 482, and cases cited.

We must presume that the theory presented by the material averments of the complaint was the one upon which the cause was tried and determined, and from

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that, in this court, neither party will be permitted to depart. With this view, we will consider the sufficiency of the complaint, together with its principal specifications in controversy. It may be conceded that, in this State, but two modes under the statute are provided for convening boards of commissioners. The first is in regular session at the time and place designated by section 5736, R. S. 1881, and section 7821, R. S. 1894. The second is in special session upon either a written or oral call, or notice, pursuant to sections 5737 and 5738, R. S. 1881, and sections 7822 and 7823, R. S. 1894. It has been held by this court—and we think properly so—that the notice provided for in the last section is not intended as notice to the public but is solely to the individual members of the board, and that it may be either oral or written. *White v. Fleming*, 114 Ind. 560.

It will be seen that section 4045, *supra*, expressly authorizes a petition for an appropriation in aid of the construction of a railroad to be presented to the board of commissioners, at any regular or special session thereof. By this statute exclusive original jurisdiction of the whole subject-matter appertaining to appropriations to be made to railway companies by way of taxation, is lodged, or vested, in the commissioners' court by the Legislature subject only to the law granting an appeal from its decision by a person "aggrieved."

While it is true that this tribunal which is purely of statutory origin, and is in its general character one of inferior and limited jurisdiction, possessing only power to act in such proceedings wherein jurisdiction is conferred upon it by the legislative department; and generally speaking the same presumptions are not indulged in its favor, as are in favor of a court of superior and general jurisdiction. By jurisdiction of the subject-matter is meant, jurisdiction of the class of cases to

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which the particular one belongs. *Chicago and Atlantic R. W. Co. v. Sutton*, 130 Ind. 405. In the case at bar, as we have seen, the board of commissioners of Rush county had the exclusive original jurisdiction of the subject-matter of granting aid to railway companies by townships of that county; and it appears that this board at least assumed to and did make the orders which the appellee in this collateral proceeding now seeks to assail upon the ground that they are absolutely void. It follows, therefore, and we do so adjudge, that, the jurisdiction of the commissioners' court over the subject-matter thus appearing, the same presumptions of regularity attend all of its particular proceedings in controversy that attach to those of a court of general jurisdiction. It will therefore be presumed, in aid of the order upon a collateral attack against the same, that every fact necessary to its validity existed. The power to decide implies also the power to decide wrong as well as right. These principles of law are fully sustained by the following authorities: *Jackson v. Smith*, 120 Ind. 520; *Chicago, etc., R. W. Co. v. Sutton*, *supra*, and cases cited; *Van Fleet Collateral Attack*, pp. 874–875; *State, ex rel., v. Wolever*, 127 Ind. 306; *Turner v. Conkey*, 132 Ind. 248 (17 L. R. A. 509); *Alexander v. Gill*, 130 Ind. 485; *McLaughlin v. Etchison*, 127 Ind. 474; *Bass v. City of Fort Wayne*, 121 Ind. 389; *Otis v. DeBoer*, 116 Ind. 531. The question which seems to be the test of jurisdiction is—Had the tribunal authority to act within range of the general subject? If it had, then there was jurisdiction. *Adams v. Harrington*, 114 Ind. 66; *Young, Tr., v. Wells*, 97 Ind. 410; *Tollman v. McCarty*, 11 Wis. 20; *Colton v. Beardsley*, 38 Barb. 29.

The earlier decisions of this court, on this point, among which are the case of *Hord, Pros. Atty., etc., v. Elliott*,

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33 Ind. 220, and others cited by appellee, lay down a general rule which seemingly the court applied to orders and proceedings of boards of commissioners in each particular matter wherein exclusive original jurisdiction was conferred upon them. These decisions, we think, must be held and deemed to be modified and distinguished in the latter cases to which we have referred. The principle that where a tribunal has jurisdiction of a general subject its determination that facts essential to jurisdiction exist, is conclusive as against a collateral attack, has been asserted and enforced by this court in many cases, and has been held to apply to the acts of common councils as well as to boards of commissioners. See *City of Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 107 (27 L. R. A. 514), and authorities there cited. The case of *White v. Fleming*, *supra*, was an action to enjoin certain assessments made by the board of commissioners for the improvement of a highway, and the contention in that cause was that the commissioners were not convened as authorized by law. This court in its opinion said: "It is alleged in the second paragraph of the complaint, that the board of commissioners came together of their own motion." And in the closing part of its opinion further said:

"If the plaintiff felt himself aggrieved by any of the subsequent orders or proceedings by or before the county board, in the prosecution of the proposed improvement, our laws gave him a complete and adequate remedy for his grievances by providing for an appeal from such orders or proceedings to the circuit court of the county.

"In his complaint herein, and in each paragraph thereof, which were filed more than two years after the filing of the petition mentioned therein, and, as we may well suppose, after the proposed improvement was about completed, the plaintiff makes a collateral attack upon

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the validity of the orders and proceedings of the county board, of which he complains. This suit cannot be maintained; for, however erroneous such orders and proceedings may have been, they were not void. Every reasonable presumption must be indulged here in the case under consideration, as in other cases of collateral attack, in the absence of averments clearly showing that the county board had no jurisdiction of the matters complained of or of the parties thereto, in favor of the validity of the orders and proceedings of such board.

* * * * *

“The complaint, in this case, and each paragraph thereof, were clearly insufficient, we think, whether challenged by demurrer below or by an assignment of error for the first time in this court.”

In the case of *Anderson v. Claman, Treas.*, 123 Ind. 471, the action was commenced to enjoin the collection of a tax assessed for the construction of a free gravel road. The theory of the second paragraph of the complaint in this case was that the order of the board of commissioners adjudging that the improvement be made, and all subsequent proceedings thereto, were void, by reason of the fact that the board was not in regular session, neither had it been called in special session by the auditor, etc., upon any notice given. This court in its opinion in that case said :

“It is evident that the board of commissioners having been in session on the 23d day of June, 1884, and made an order relating to the construction of said turnpike, the board having jurisdiction of the parties and the subject-matter of the action, their orders were *prima facie* valid, and not subject to a collateral attack as in this case. If the validity of this order had been contested in an appeal taken from the final order and judgment of the board, a different question would be presented for

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our consideration. The board of commissioners passed upon their right to sit and transact business, and made an order in the case, and such order so made cannot be attacked in a collateral proceeding."

The rule laid down by the cases last cited is supported by the decisions of this court, in *Jussen v. Board*, 95 Ind. 567; *State, ex rel., v. Board, etc.*, 104 Ind. 123; *Board, etc., v. Hall*, 70 Ind. 469.

In the case of *Board, etc., v. Hall, supra*, which was an action to enjoin the collection of a railroad tax, Worden, J., speaking for this court, said:

"Now, it is manifest that, on the filing of a petition for such aid, one of the questions to be met and decided by the board is, whether the railroad company, in whose favor the aid is asked, is then duly organized under the laws of this State; for, unless such be the case, the board is not authorized to make the order granting the prayer of the petition.

"The filing of the petition calls into exercise the jurisdiction of the board, and authorizes that body to determine, not only whether the petition is properly signed by the requisite number of freeholders of the township, but every other fact necessary to the granting of the prayer of the petition, including the due organization, under the laws of this State, of the company in whose favor aid is asked.

"By making the order granting the prayer of the petition, the board must be taken to have decided that the company was such an one as was, under the statute, entitled to aid; and if, in this respect, it has committed an error, the decision is, nevertheless, binding and conclusive, unless appealed from, and cannot be attacked collaterally, as by injunction upon the collection of the tax. These principles are well established by the authori-

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ties above cited upon the point, and by numerous others.

* * * * *

“Nor is there any hardship in this view of the question, as the tax-payer who has an interest in the matter decided, and is aggrieved by the decision, may appeal therefrom, and thus contest the question as to the due organization of the corporation.”

The following decisions also are in harmony with, and fully support, the proposition under consideration. *Ballard v. Thomas*, 19 Gratt. 14; *State, ex rel., v. Board, etc.*, 101 Ind. 69; *Maxwell v. Board, etc.*, 119 Ind. 20; *Smurr v. State*, 105 Ind. 125, and the many cases therein collated. See also *Pittsburg, etc., R. W. Co. v. Harden, etc.*, 137 Ind. 486, in which several of the identical propositions involved in the case at bar are decided adversely to appellee.

As heretofore said, the complaint was formulated by appellee upon the theory that the commissioners at the time in question came together on their own volition without notice from any officer designated by the statute. It also appears from the complaint, and the exhibits filed therewith, that all the members of the board were present at the place provided by law for their meeting, and at a time when they could have convened in special session, upon call, as these sessions are not definitely fixed by the statute. It must be at least presumed that they passed upon their right to sit as a board, at the time in controversy. The board determined its right at the time to act in a matter in which it had the exclusive original jurisdiction, and in which jurisdiction under the law might be exercised by it, at either a regular or special session. It made and caused to be entered in due form by the auditor, an order granting the prayer of the petition and fixing the time for the election. The election was held after due publication; and at the regular June

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term, 1887, the result thereof was reported to the board and the tax in controversy levied and the collection thereof suspended until further order. The matter then rested until June 17, 1890, when upon it appearing to the board that the railroad company had made a large expenditure of money in the building of the road in Rush county, and that the same was being pushed to a speedy completion, the order of suspension was set aside and the tax ordered to be collected. The very fact of the board coming together at a time and place, when and where a special session might be held implied an assertion of right to hold it. The petitioners when they presented their petition found this tribunal convened and acting under a claim of authority so to do. It was upon any view at least a *de facto* court, if not *de jure*, sitting and exercising duties under color of right, and its acts ought to, under the facts in this case, be protected against a collateral attack. *Case v. State*, 5 Ind. 1; *Creighton v. Piper*, 14 Ind. 182; *Smurr v. State*, *supra*; *Brown v. O'Connell*, 36 Conn. 432; *Venable v. White*, 2 Head (Tenn.), 582; *Bouldin v. Ewart*, 63 Mo. 330; *Rogers v. Loop*, 51 Iowa 41.

Tested by the rule laid down and the principles enunciated in the authorities which we have cited, to the reason and logic of which we feel bound to yield, it follows, that the complaint, and each and all of its specifications in question, must be held to be insufficient to entitle the appellee to equitable relief. Again, upon another view of the case, we think the complaint is not sufficient, for the reason that it is in many respects devoid of equity. Where a litigant seeks to assail by injunction, proceedings which are alleged to be invalid, he must also show by his complaint that he is entitled to equity.

The general rule, as laid down by the authorities, is that where one invokes the aid of a court of equity, in a

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case of this character, it must appear from the facts that to execute the judgment sought to be enjoined, would be against good conscience. The appellee rested until February 16th, 1891, as it appears, before he took any steps to object to the proceedings of the commissioners, and then after waiting for over three years, and until the railroad company, in consideration of the donation, had expended money and time in the construction of the road, and had acquired rights, he seeks relief in a court of conscience, where the laches of a suitor are never favored, but always discouraged. Admitting that the infirmity of the board's jurisdiction as it appears from the allegations of the complaint could be assailed collaterally, the complaint, however, considered as an entirety, does not, we think, show a clear equity in favor of appellee. See *Stokes v. Knarr*, 11 Wis. 407; 2d Story Eq. Jur., section 898; *Williams v. Hitzie*, 83 Ind. 303; *Woods v. Brown, Guar.*, 93 Ind. 164; *Lininger v. Glenn*, 33 Neb. 187; *Wilson v. Shipman*, 34 Neb. 573, 52 N. W. R. 376; *Hamer v. Sears*, 81 Ga. 288; High Inj., section 125; Beach Modern Eq., section 659; *Palmer v. Stumph*, 29 Ind. 329; *Ricketts v. Spraker*, 77 Ind. 371; *City of Logansport v. Uhl*, 99 Ind. 531; *Vickery v. Board, etc.*, 134 Ind. 554; *Chamberlain v. Lyndeborough*, 64 N. H. 563; 10 Am. and Eng. Ency. of Law, 802. Appellee also, as a person "aggrieved," had an adequate legal remedy granted to him by appeal. *Gavin v. Board, etc.*, 81 Ind. 480; *Jussen v. Board, etc., supra*; *Board, etc., v. Montgomery*, 106 Ind. 517. Where a party has an adequate remedy by appeal, he cannot invoke the extraordinary one of injunction. A party may even appeal from a void judgment and secure a judicial declaration of its invalidity by invoking the aid of the appellate court. *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191, and cases

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cited ; *Board, etc., v. Logansport, etc., Grav. Road Co.*, 88 Ind. 199 ; Elliott App. Proced., 110.

It is not insisted by appellant, nor do we so decide, that a court may hold a term in defiance of law. No law was violated, for there is none definitely fixing a time for special sessions of boards of commissioners.

We must not be understood as holding that in no event can a void judgment be collaterally impeached, but we confine our decision to the facts presented in this case.

It follows from the conclusion reached, that the court erred in overruling the demurrer to the complaint and to each specification thereof.

The judgment of the general term affirming the one of the special term is reversed, at the cost of appellee, and the cause is remanded to the trial court, with instructions to sustain the demurrer to the complaint and to each specification thereof, and vacate the judgment and decree, and for further proceedings in accordance with this opinion.

Filed April 2, 1895 ; petition for rehearing overruled October 18, 1895.

No. 17.083.

HATFIELD ET AL. v. CUMMINGS, RECEIVER, ETC.

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RECEIVER.—*Leave of Court to Bring Action.—Sufficiency of Complaint.*—The complaint in an action by a receiver, in his own name, to sufficiently state a cause of action, must show by direct and positive averments, that leave of court to institute and prosecute the action has been first obtained.

From the Huntington Circuit Court.

Hatfield *et al.* v. Cummings, Receiver, etc.

J. M. Hatfield, J. T. Alexander, J. B. Kenner and U. S. Lesh, for appellants.

L. P. Milligan, O. W. Whitelock and S. E. Cook, for appellee.

JORDAN, J.—This action was commenced by the appellee in his own name, as the receiver of the Lime City Building, Loan and Savings Association, to obtain a judgment upon a note executed by appellant, Thursey J. Hatfield, and the foreclosure of a mortgage executed by the appellants, Thursey J. and James M. Hatfield, to said association.

The appellee prevailed, and recovered a judgment upon the note in suit against Thursey J., and a decree of foreclosure of the mortgage against all of the appellants.

From this judgment the appellants have appealed to this court, and have separately assigned a number of alleged errors, among which are: “That the court erred in overruling the demurrer to the complaint; that the complaint does not state facts sufficient to constitute a cause of action; that the court erred in overruling a motion for a new trial.”

Appellants assail the sufficiency of the complaint upon several grounds: One of which is that it does not state a cause of action in appellee (plaintiff below).

The only averments therein, as to the right or authority of the receiver to sue upon the note and mortgage in question, are as follows:

“That on the 15th day of June, 1892, in an action pending, which action was commenced on April 12, 1890, in said court, wherein Henry C. Black, is plaintiff, and the Lime City Building Loan and Savings Association, et al., are defendants, to recover the value of said Black’s stock in said association, he was duly appointed, and

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has since qualified as receiver of said association, and empowered to collect by suits the claims due said association."

It is well settled by the authorities that a complaint filed by a receiver, in his own name, to sufficiently state a cause of action, must show by proper averments, that leave of court to institute and prosecute the action has been first obtained. *Davis v. Ladoga Creamery Co.*, 128 Ind. 222, and authorities there cited. *Wayne Pike Co. v. State, ex rel.*, 134 Ind. 672, and cases there cited. In High on Receivers, section 201, the law on the question involved is thus stated: "It is essential therefore in order to sustain a suit brought by him (the receiver), in his representative capacity, that he allege and set forth the equities of the parties whose right of actions he represents, and he must also show that by the appointment of the court, properly made in a matter, within its jurisdiction, that authority has been conferred upon him in his representative capacity as receiver to prosecute the action, and failing to show this, he cannot maintain an action."

In the case of *Davis v. Ladoga Creamery Co., etc.*, *supra*, this court said: "In our opinion the complaint in this case is fatally defective in failing to allege that the receiver obtained an order of the court appointing him to institute this suit before the action was commenced."

The authority from the court to the receiver to sue in his own name lies at the very basis of his right to bring the action, and no such right exists under the law in this State, until it is granted to the receiver by the court. The averments in regard to the point under consideration are meager and defective, and the complaint in this respect does not conform to approved forms or the rules governing pleadings.

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What is meant or intended by the allegations in question, is not direct or positive, but is left to be inferred. Facts that are necessary to constitute a right of action, must be stated directly and positively, in an issuable form, and not in ambiguous language. This is elementary. See *Wheeler v. Thayer*, 121 Ind. 64, and authorities there cited.

Tested by the principles of law to which we have referred, we think that the complaint is not sufficient, for the reasons stated, and the demurrer thereto ought to have been sustained.

The sufficiency of the evidence to support the judgment is also called in question, but as a reversal must follow on account of the above mentioned infirmity in the complaint, we do not deem it necessary to consider the many other propositions presented by the appellants. However, we may here suggest that there is no evidence appearing in the record, showing either the appointment of the appellee by the court as receiver, or that he obtained any authority whatever to commence and prosecute this action. See High on Receivers (third edition), section 231.

We do not mean to be understood or to hold, by what we have said in this opinion, that it is necessary in each case for the receiver to apply to the court for authority to bring an action where the court, in the order appointing him, has granted a general leave or authority to bring and prosecute all suits in his own name.

The judgment below is reversed, at the cost of the appellee, with instructions to the court to sustain the demurrer to the complaint, with leave to amend, and for further proceedings in accordance with this opinion.

Filed February 19, 1895.

VOL. 142—23

No. 17,507.

MOORE ET AL. v. MORRIS.

ABATEMENT OF ACTION.—Plea, Insufficiency Of.—Nonresidence of Defendants.—A plea in abatement based on the nonresidence of the defendant within the county in which the action is brought is insufficient, where it merely avers that the defendants are residents of another county, without specifically negating their residence in the former county when the action was commenced.

ASSIGNMENT OF ERRORS.—Collective Assignment.—When Unavailable.—Demurrer.—A joint assignment of error in sustaining a demurrer to different paragraphs of an answer does not present a question as to the sufficiency of either paragraph, but of both, and if the ruling as to one is correct the assignment fails.

DEMURRER.—Sustaining to Paragraph of Answer.—Same Defense Admissible Under Another Paragraph.—A demurrer to a paragraph of an answer setting up the statute of limitations to a single paragraph of the complaint is properly sustained where another sufficient paragraph sets up the same statute in answer to the whole complaint, and particularly to the paragraph in question—especially where a demurrer to the only other paragraph of the complaint has been sustained.

From the Hamilton Circuit Court.

S. E. Urmston and H. Warrum, for appellants.

Fertig & Alexander and Harding & Hovey, for appellee.

HOWARD, C. J.—The original paragraph of the complaint in this case alleged facts going to show fraud on the part of appellants and their agents in the procurement from appellee of deeds for certain lands in Hamilton county, during a time, as alleged, when appellee was of unsound mind and incapable of transacting business; praying that the deeds be set aside, and for possession and damages.

A second paragraph of complaint was afterwards filed, not alleging unsoundness of mind, but setting up

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the fraud in a more particular manner; asking for damages and to have a vendor's lien on the land declared in appellee's favor.

Other pleadings were filed, and there was a finding by the court and judgment for damages in favor of appellee. A vendor's lien was also awarded for any balance of the judgment left after execution against the personal estate of the appellant Robert E. Moore.

The first assigned error discussed by counsel is that the court erred in sustaining the appellee's demurrer to the appellants' plea in abatement to the second paragraph of the complaint.

In *Needham v. Wright*, 140 Ind. 190, it was said, citing numerous authorities, that in pleas in abatement and other dilatory pleas the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, are required. The pleader must not only answer fully what is necessary to be answered, but must also anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea.

Tried by this rule, the plea in abatement filed by appellants was insufficient for many reasons. It will be enough to indicate one of them. The plea was based chiefly on the claim that the appellants were residents of Marion county, and could not, therefore, be sued on a merely personal action in Hamilton county. We do not think the action as stated in the second paragraph of the complaint was merely personal; but, even if it were, the averment that "the said defendants are residents of Marion county, Indiana, and are not residents of Hamilton county," would not be sufficient. For all that appears from this or any other averment in the plea, the appellants might have been residents of Hamilton county at the time the action was begun. If

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they had been residents of Hamilton county when process was issued and served, they could not defeat such service by moving to Marion county before the filing of the plea in abatement.

The only other assigned error discussed by counsel is that the court erred in sustaining the appellee's demurrer to the third and fifth paragraphs of the appellants' answer.

This assignment, being joint as to the two paragraphs named, does not present the question as to the sufficiency of either, but of both. If, therefore, the ruling as to one of the paragraphs was correct, the assignment must fail. *Ketcham v. Barbour*, *Exr.*, 102 Ind. 576; *Noe v. Roll*, 134 Ind. 115.

The fifth paragraph of answer was a plea of the six-years' statute of limitations as against the fraud alleged in the second paragraph of the complaint. The second paragraph of the answer, to which a demurrer was overruled, was also a plea of the six-years' statute of limitations, in answer to the whole complaint, and particularly to the second paragraph thereof. In addition, at the time of filing the answer, a demurrer had been sustained to the first paragraph of the complaint, thus leaving the second paragraph as the whole complaint. As, therefore, all facts which could be proved under the fifth paragraph of the answer could also be proved under the second, the court did not err in sustaining the demurrer to the fifth; even if there were any error in sustaining the demurrer to the third paragraph, which we do not think.

No question is raised as to the correctness of the judgment on the merits of the case.

The judgment is affirmed.

Filed October 29, 1895.

Walsh, Treasurer, et al. v. The State, ex rel. Soules, Auditor.

No. 17,640.

WALSH, TREAS., ET AL. v. THE STATE, EX REL. SOULES,
AUDITOR.

STATUTE.—*Amending Unconstitutional Act so as to Remedy Defect.—*
Fees and Salaries.—Case Modified.—An amendment of a statute relating to fees and salaries of officers, which was unconstitutional as to certain officers because it did not apply to all the counties in the State, may be made by a subsequent Legislature so as to extend provisions in respect to those officers to all the counties, and thereby remedy the constitutional objections. *State, ex rel., v. Boice*, 140 Ind. 506, modified.

MCCABE, J., and HACKNEY, J., dissent.

From the Vigo Circuit Court.

J. R. Wilson, Lamb & Beasley, J. B. Black and E. B. Pugh, for appellants.

W. A. Ketcham, Attorney-General, and *S. M. Huston*, for appellee.

JORDAN, J.—This action was commenced by the State in the lower court, on the relation of the auditor against the appellant, Walsh, treasurer of Vigo county, and his co-appellants, who are sureties upon his official bond. The breach of the bond, as alleged in the complaint, was the failure of said appellant, as such treasurer, to pay over certain moneys, and a conversion of the same to his own use, upon the claim and contention, that under the provisions of the act of 1879 (Acts of 1879, page 130), he was entitled to receive and retain for his own use as compensation, one per cent. upon the first one hundred thousand dollars of taxes collected by him, and one-half of one per cent. upon the residue collected in excess of one hundred thousand dollars, and in addition thereto six per cent. upon all delinquent taxes collected by him, as provided by section 30 of the act of 1879. Appellants

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149	513
151	692
149	357
153	72
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157	450
157	455
142	357
158	186
158	534
142	357
159	581
142	357
160	557
142	357
161	482
142	357
163	93
163	416
142	357
166	189
168	17
142	357
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unsuccessfully demurred to the complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action ; and the decision of the court in overruling the demurrer is the only error assigned. The gist of the contention of appellants' learned counsel is, that inasmuch as the salary provisions as fixed by the act of 1891 (Acts of 1891, page 424), have been declared unconstitutional by this court in the case of *State, ex rel., v. Boice*, 140 Ind. 506, these are thereby eliminated from that act. That this being true, the only remaining provisions of the law of 1891, in respect to the treasurer's compensation, are the fees provided and allowed by sections 120 and 122, and hence it is contended that as this act now stands, since the decision of this court, in the Boice case, *supra*, there is no conflict in regard to the compensation of county treasurers between it and the act of 1879 ; and that therefore this last act in this respect is not repealed by the former, and consequently appellant Walsh is entitled to the compensation and fees allowed by the provisions of the act of 1879. In the case of *Henderson, Aud., v. State, ex rel.* (24 L. R. A. 469), 137 Ind. 552, the principal features, and scope of the law of 1891, were by a majority of this court, at that time, held to be constitutional and a valid exercise of legislative power. While in the judgment of the writer of the opinion in the case at bar, speaking individually for himself, and not for the court, the result reached in the case last cited, may be in some respects questionable, however, that decision and also the one of *State, ex rel., etc., v. Krost*, 140 Ind. 41, are still adhered to and approved by a majority of the members of this court, as now constituted, and the question therein involved and decided must be deemed and held, at least so far as the act of 1891 is concerned, as settled.

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In the case of the *State, ex rel.*, v. *Boice, supra*, it was held by this court, that by reason of the fact that the fee and salary law of 1891, in section 93, omitted to provide salaries for certain officers of Shelby county, that of treasurer being among the number, it was unconstitutional, upon the grounds that the act was thereby in conflict with Art. 4, section 22, of the State Constitution, prohibiting local laws except those which grade the compensation of officers in proportion to population, and the services required; and, also, that it was in conflict with Art. 4, section 23, by reason that it was not of a general and uniform operation throughout the State.

At the very threshold of the consideration of the cardinal questions involved in this appeal, we are confronted by the proposition, or rather request, upon the part of the State's able and learned attorney-general to consider the validity and effect of the legislative act approved February 25, 1893 (Acts 1893, page 142), amending section 93 of the statute of 1891, which amendatory act supplied the omissions of the section as it was originally enacted, by providing compensation for the auditor, treasurer, and recorder of Shelby county. His contention is that this amendment was a valid exercise of power upon the part of the Legislature, and that thereby the objectionable features of the statute and its constitutional infirmities as adjudged to have existed against it, in the case of *State, ex rel.*, v. *Boice*, were eliminated by supplying the provisions which made the law, in question, conform to the requirements of the constitution, and that thereby its invalidity was cured, and the salary provisions thereof, as a whole, rendered operative in the future. This is an important question, under this contention, for the determination of this court, and we have given it such consideration and deliberation as time would permit, and have arrived at the conclusion that

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this contention of the attorney-general must be sustained, and is decisive in this appeal. It appears from the facts alleged in the complaint that appellant Walsh was elected treasurer of Vigo county, in 1892, and that his official term began, and he assumed the duties of his office, on August 22, 1893. The laws of 1893, and along with them, the amendatory act in controversy, went into force and effect May 18, 1893, and hence if this act resulted in curing the constitutional infirmities that existed against the statute of 1891, its effects, or results, are applicable to, and controlling in the case now before us. For, as heretofore stated, appellant was elected after the taking effect of the law of 1891, and also went into office subsequent to the taking effect of the amendatory act in controversy.

Section 93, as it appears from the printed acts to have been originally adopted, is as follows :

“Sec. 93. In the county of Shelby the annual salary of the clerk of the circuit court shall be twenty-three hundred dollars, and of the sheriff twenty hundred and fifty dollars.” (Acts 1891, p. 437.)

The act of 1893, by which this section was amended, was entitled : “An act to amend section 93, of an act fixing the compensation, prescribing the duties of certain State and county officers, and providing penalties for the violation of its provisions, approved March 9, 1891,” and is as follows :

“Sec. 1. Be it enacted by the General Assembly of the State of Indiana, that section 93 of the above entitled act be and the same is hereby amended so as to read as follows : Sec. 93. In the county of Shelby the annual salary of the clerk of the circuit court shall be twenty-three hundred (2,300) dollars, of the auditor twenty-five hundred and fifty (2,550) dollars, of the recorder thirteen hundred (1,300) dollars, of the treasurer twenty hundred

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and fifty (2,050) dollars, and of the sheriff twenty hundred and fifty (2,050) dollars.”

It is evident and undisputed, that where a statute, or any part thereof, is invalid by reason of an absence of power in the Legislature, in the first instance, under the constitution to enact the law, it would not be possible for that body to confirm or render the same valid by amendment. But where the obnoxious features of the statute may be removed, or essential ones supplied by a proper amendment, so that it can be held that had the law been primarily so moulded or framed under its title and within its scope, as it has been by the amendment thereto, it would have been free of the objections existing against it, as it originally stood, and also within the power of the Legislature to enact it, then and in that event, the statute may be rendered valid by amendment, so far as its future operations may extend. See *State v. City of Cincinnati* (Ohio Supreme Court), (27 L. R. A. 737), 40 N. E. Rep. 508. The act of 1891, it must be remembered, was not held to be invalid as an entirety but only as to a part of its salary provisions. The act of 1893 does not attempt, or profess, to amend the entire act of 1891, it only supplied certain provisions in which section 93 was deficient. This section, as we have seen, made provisions alone for the compensations of the clerk and the sheriff of Shelby county, and to this extent it was constitutional, under the decision of *Henderson v. State, ex rel., supra*. Being constitutional then so far as it concerned the salaries of the clerk and sheriff, it was subject to amendment in like manner as sections of other statutes.

The only limitation placed upon the Legislature was not to extend it by the amendment beyond the subject of the original act, and matters properly connected therewith. Suth. Stat. Constr., section 132. Strictly

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speaking, an amendatory act is not regarded as an independent statute, and it may be framed so as to amend certain parts of the law, and to add such supplementary sections as might be embraced under the title of the original act. *State v. Bowers*, 14 Ind. 195; *Brandon v. State*, 16 Ind. 197; *Shoemaker, Aud., v. Smith*, 37 Ind. 122.

It is firmly settled that where a section in an existing law is amended in the mode prescribed by the constitution, it ceases to exist, and the section, as amended, supersedes the original, and becomes incorporated in, and constitutes a part of, that act. *Blakemore v. Dolan*, 50 Ind. 194; *Feibleman v. State, ex rel.*, 98 Ind. 516. A statute, amending a former act, operates as to matters thereafter occurring precisely as if the amendatory act had been added to the original act at the time of its adoption, and the two acts must be construed together, and as one statute. *Holbrook v. Nichol*, 36 Ill. 161; *Turney v. Wilton, Ib.* 385; *Kamerick v. Castleman*, 21 Mo. App. 587; Endlich Interp. Stat., section 294; *Ely v. Holton*, 15 N. Y. 595; *State, ex rel., v. Ranson*, 73 Mo. 88.

In the case of *State v. City of Cincinnati, supra*, where the question of curing an unconstitutional statute by an amendment was before the supreme court of Ohio, it was said :

“Where one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections, as amended, must be construed as though introduced into the place of the repealed section or sections in the original act, and, therefore, in view of the provisions of the original act as it stands after the amendatory sections are so introduced. *McKibben v. Lester*, 9 Ohio

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St. 627. And, it may be added, the other sections are to be interpreted in connection with, and in view of, the amended section or sections, and, in its application to cases arising after the amendment has been made, the whole statute must have the same operation and effect as if it then had been re-enacted, in terms. Hence, an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to conform it to the requirements of the constitution."

This power of rendering valid a statute, unconstitutional in part, was exercised by the Legislature of this State, prior to the amendatory act of 1893.

In the case of *Kuntz v. Sumption, Treas.*, 117 Ind. 1 (2 L. R. A. 655), this court held that the tax statute was unconstitutional, so far as it authorized boards of review to add property to the list of a taxpayer, without giving him notice. Immediately following this decision, the Legislature of 1889, amended the law by providing for the required notice (Acts 1889, p. 367). This act of legislative authority, in supplying this omission in the statute as to notice, was not, to our knowledge, controverted. The constitutional question, upon which the decision in the Boice appeal was based, was not because of any infirmity in section 25 of the act of 1891, which provided compensation for the officers of Benton county, but was solely for the reason that section 93 omitted to name and fix the salary for the treasurer of the county of Shelby. The court did not deny that the Legislature had the right and power in the first instance to have embraced within said section and provided for the compensations of the treasurer, auditor and recorder of that county, in like manner, as was provided for the other ninety-one coun-

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ties of the State, but adhering to the rule laid down in the case of *Henderson, Aud., v. State, ex rel., supra*, virtually affirmed the constitutional power of the General Assembly to have so provided. Possessing and being vested then with this power originally, in view of the authorities to which we have herein referred, and by force of the reason and logic thereof, how can it, in reason, be said, that the Legislature cannot exercise it by a proper amendatory act, adopted in conformity to the constitution?

This curative principle, or power, finds support, by analogy at least, in the decisions where it is held that, whenever a thing is wanting, or which had been omitted in the proceedings of boards or other officials, by reason of which such proceedings or action are thereby rendered invalid, and that the thing wanting, or which had been omitted, was something that the Legislature might have dispensed with by a prior statute, then and in that event that body may validate the proceedings by a curative act. *Sithin v. Board, etc.*, 66 Ind. 109; *Johnson v. Board, etc.*, 107 Ind. 15; Endlich Interp. Stat., sections 291 and 293.

In fact, this doctrine seems to have been applied in broad terms by the Supreme Court of the United States, *In re Rahrer*, 140 U. S. 545, wherein it was said that where Congress, having removed the obstacle which rendered a prohibitory law of a State invalid, or inoperative, as to intoxicating liquors imported and sold in the original packages, that it was not necessary thereafter to re-enact such prohibitory statute, in order to make it operative upon such liquors in the future.

Being impressed with this view, for the reasons herein stated, we are constrained to hold that the act of 1893, amending section 93 of the statute of 1891, served the same purpose, and had the same effect, after going into

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force on the 18th day of May, 1893, as though it had been written *in hæc verba*, in the act of 1891, and from the date last mentioned, the law of 1891 was, as the result of the amendment in question, freed of the constitutional invalidity held to exist against it, as originally enacted. From and after that time the salary features, or provisions, thereof were by the amendment made to apply to all the treasurers, auditors and recorders in the ninety-two counties of the State, and these provisions in the act, as amended, would thenceforward operate in controlling the compensation, as therein provided, of such auditors, treasurer, and recorders, as do not come within the exception of section 136, until superseded by a subsequent law, in like manner, and to a like effect, as though the provisions incorporated into section 93, by the amendment, had been added thereto at the time of the passage thereof, and the two acts must be construed together as one statute.

It would, therefore, follow, as a necessary result, that all laws, and parts of laws, in conflict therewith, would be repealed to the extent of such conflict, as provided by section 137 thereof. As the provisions of the act of 1879, under which appellant claimed and retained the fees in controversy, are in conflict with the act of 1891, they must be deemed and held to be repealed, and he must look to the latter, and such other laws, if any, not in conflict therewith, to award him compensation for the discharge of his official duties. While it is true that the conclusion which we have reached, so far as the operation of the amendatory act in question is concerned, is at variance with the opinion of this court in the case of *State, ex rel., v. Boice*, but the question at that time received but a cursory examination and a brief consideration by the court, and what was there said relative thereto, was upon a mere suggestion upon the part of counsel for the

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State, and without due deliberation, and so far as the decision in that case may conflict with this opinion, it must be deemed and held to that extent as modified. Other constitutional questions are presented by counsel for appellant, but, in view of the conclusion which we have reached, they are not applicable.

The trial court did not err in overruling the demurrer, and the judgment is affirmed.

MCCABE, J., dissents, for the reasons stated in his dissenting opinion in *Henderson, Aud., v. State, ex rel., supra*.

Filed June 22, 1895; petition for rehearing overruled October 18, 1895.

DISSENTING OPINION.

HACKNEY, J.—I dissent from the conclusion reached by the majority opinion for the reasons stated in the case of *State, ex rel., v. Boice*, 140 Ind. 506, and for the reason, as stated in *Clare v. State*, 68 Ind. 17, that: “It is settled by the decisions of this court, that an act to amend a law, which has been repealed or is invalid from any cause, is also an invalid and void law. *Blake-more v. Dolan*, 50 Ind. 194; *Ford v. Booker*, 53 Ind. 395; *Cowley v. Town of Rushville*, 60 Ind. 327.” See also *Lawson v. DeBolt*, 78 Ind. 563; *McIntire v. Marine*, 93 Ind. 193. Nor do I believe that two distinct and dependent provisions, by two Legislatures, may be brought together to constitute a valid enactment. In *State v. City of Cincinnati*, 40 N. E. R. 508, cited in the original opinion the two provisions were brought together by the same Legislature. The power to amend a valid act is not affected by my conclusions, nor does it, in my opinion, support the conclusion of the principal opinion.

Filed June 22, 1895.

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No. 17,530.

RAYMOND ET AL. v. WATHEN ET AL.

APPELLATE PROCEDURE.—*Amendment of Pleading.*—An amendment of a complaint, by leave of the court, by inserting a necessary averment in order to conform it to the proof, renders an objection to the overruling of a demurrer based on such omission unavailable.

SAME.—*Amendment of Pleading.*—A party cannot complain in the Supreme Court, of the granting of permission to the adverse party to amend his pleading to conform to the proof, where the record does not disclose that he was in any way deceived by the amendment, or prejudiced in his rights thereby.

EVIDENCE.—*Conveyance.—Mental Incapacity of Grantor.—Presumption.*—The mental incapacity of a grantor, accompanied with and probably due to the infirmities of old age, and decrepitude, will be presumed to have continued from the date of the execution of the deed in question until his death, occurring about one month thereafter.

CONVEYANCE.—*Deed.—Mental Incapacity of Grantor.—Rule.*—An essential privation of the reasoning faculties, or any incapacity of understanding, and acting with discretion in the ordinary affairs of life, renders a person of unsound mind and incapable of executing a deed.

AMENDMENT OF PLEADING.—*When May Be Made.—Practice.*—The trial court may permit the amendment of a complaint to conform it to the proof at any time before final judgment, even after a verdict, under section 399, R. S. 1894, providing that the court may allow such an amendment “at any time.”

PLEADING —*Demurrer.—Complaint Attacking Invalidity of Deed.—Two Grounds Stated in One Paragraph.*—A demurrer to a complaint attacking the validity of a deed will be overruled, where the alleged invalidity is based upon two grounds set forth in a single paragraph, treated as such by the parties, if one of the grounds set forth sufficiently state a cause of action.

INTERROGATORY TO JURY.—*Conveyance.—Undue Influence.—Deed.*—An interrogatory upon the trial of an issue as to undue influence in procuring the execution of a deed, asking the jury to specifically find “how much influence was exercised,” is properly rejected.

From the Daviess Circuit Court.

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144	492
142	367
150	163
152	522
142	367
154	238
142	367
162	364
142	367
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H. Burnes and J. S. Pritchett, for appellants.

W. R. Gardner, C. G. Gardner and W. R. Gardner, Jr., for appellees.

JORDAN, J.—Appellees, as the children and heirs of Eberhart H. Raymond, commenced this action to avoid and set aside a certain deed executed by said Eberhart H. to appellant Sarah B. Raymond, by which he conveyed to her real estate and personal property of the alleged value of five thousand dollars, in consideration of one dollar, and love and affection. The validity of the deed in question is assailed by the complaint upon two grounds, to-wit:

1. Mental incapacity of the grantor.
2. Undue influence in procuring its execution.

The complaint, among other things, alleges, that the deed was executed by the said Eberhart H. Raymond, on the 23rd day of April, 1894, and that he died on May 28, 1894, and at the date of its execution he was of unsound mind. That at said date he was eighty-two years of age, and at and prior thereto he was enfeebled by age, and physical and mental decrepitude.

Further facts are alleged, exposing the invalidity of the deed upon the ground of undue influence exercised over the grantor at the time of the conveyance. Appellants each separately, but unsuccessfully, demurred to the complaint as an entirety upon the ground of insufficiency of facts. Upon the issues joined between the parties by an answer in denial, a trial resulted in a jury returning a general verdict for the appellees, and also special findings upon three interrogatories submitted to them, to the effect that the deed in controversy was procured to be executed by the undue influence exercised over the grantor by all of the appellants, and at the time

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he executed the same he did not have sufficient mind and memory to understand the ordinary affairs of life, and have a general knowledge of his property. Over the separate motions of appellants for a new trial, and in arrest of judgment the court rendered its judgment setting aside the deed.

The first error urged upon us for consideration by appellants' learned counsel, is that the complaint was not sufficient in facts to withstand a demurrer, and that, therefore, the court erred in overruling the same. As we have seen, the invalidity of the deed was based upon two grounds set forth in a single paragraph, and treated as such by the parties, as there was no motion to require plaintiffs to further paragraph their complaint. Therefore, it is evident, we think, that each ground, or specification, must be viewed or treated in the character of a separate paragraph, and where the demurrer does not challenge each ground specifically, but all as an entirety, in the words, "that the complaint does not state facts sufficient, etc.," then, and in that event, if any one of the grounds set forth is sufficiently stated to constitute a cause of action, there will be no available error in overruling the demurrer, upon the same principle that a joint demurrer to a pleading of several paragraphs of which one, at least, is good must be overruled. *Mustard v. Hoppess*, 69 Ind. 324; *Hilton v. Mason*, 92 Ind. 157; *Hill v. Probst*, 120 Ind. 528; *Jones v. Cullen*, 142 Ind. 335; *Ohio, etc., R. W. Co. v. McCartney*, 121 Ind. 385.

We think that the complaint, as formulated and treated by the parties herein, comes within the rule laid down and approved by the above decisions.

It is insisted that the pleading does not state a cause of action upon the ground of 'insanity for two reasons:

1st. That there is an absence of facts showing that

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the grantor "continued to be of unsound mind until his death, or that he disaffirmed the deed after he became of sound mind."

2nd. That it does not allege that the grantor, or the appellees as his heirs, had disaffirmed the deed prior to the commencement of this action.

In support of their first objection, the appellants cite *Hardenbrook v. Sherwood*, 72 Ind. 403, and *Louisville, etc., R. W. Co. v. Herr*, 135 Ind. 591. Neither of these cases, we think, is applicable to the case at bar upon the first proposition, in view of the facts as they appear upon the face of the complaint.

In the case first cited more than eighteen months had elapsed after the insane ward had executed the replevin bond (he not being under guardianship at the time of its execution) before the filing of the complaint by his guardian, and as it did not directly or inferentially appear that the mental disability therein alleged continued, etc., this court held it insufficient. By the pleading now under consideration, it is shown that the grantor was eighty-two years of age, enfeebled by age, and physical and mental decrepitude, and that his death occurred in about a month after the execution of the deed.

The mental condition of the grantor, as it is apparent from the facts in the complaint, was accompanied with, and probably due to the infirmities of old age and decrepitude, and the inference or presumption under these facts must follow that his mental condition would not improve in the short limit of his life subsequent to the execution of the conveyance in controversy.

The presumption as to the continuance of insanity when once shown is one of fact, varying with the particular case. 2 Wharton Ev., section 1253.

The rule, however, does not apply to occasional or

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intermittent insanity, but it does in all cases of whatever nature, wherever the insanity is apparently confirmed.

In *Physio-Medical College v. Wilkinson*, 108 Ind. 314, in passing upon a question similar to the one here involved, on page 319, it was said:

“The complaint before us presents a case of mental unsoundness, accompanied with, and probably resulting from the infirmities and decrepitude of old age. There is no presumption either of law or fact that passing years give release from such impairment of reason.”

We think, the complaint not subject to appellants' first objection.

As the complaint was originally drafted there was an omission of the technical averment that the grantor or the appellees, as his heirs, prior to the commencement of the action, had disaffirmed the deed. After the motion for a new trial was overruled, and pending the motion in arrest of judgment, appellees obtained leave of court over appellants' objection, and amended the pleading in this respect, by inserting the necessary averment in order, as appellees contend, to conform it to the proof. With the fact of disaffirmance appearing in the complaint by virtue of the amendment, it was cured of the infirmity urged against it, and no longer open to appellants' objections, and consequently no available error resulted from overruling the demurrer to the alleged cause of action based upon the ground of the grantor's insanity. The complaint being sufficient upon this basis, and the demurrer having assailed it as an entirety, the action of the court in overruling it was proper, and, therefore, in order to uphold the pleading, we are not required to consider its sufficiency in regard to the charge of undue influence.

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Appellants have assigned and urged as error the action of the court in permitting the amendment of the complaint after the verdict, by inserting therein the omitted averment relative to the disaffirmance of the deed. The ruling of the court in allowing this amendment, and the matter inserted into the complaint thereby are in the record by a bill of exceptions.

Appellants' contention is, that by this amendment an important and entirely new issue was presented, and that they were entitled to notice thereof, before trial, in order that they might be prepared to meet it with proof. By section 399, R. S. 1894, section 396, R. S. 1881, discretionary power is lodged in the trial court to allow a party "at any time" to amend his pleading by inserting any material allegation, etc., "to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense." These words "at any time" as embraced in this section have a broad meaning, and this clause has been, and may in reason be construed, to permit the amendment in furtherance of justice to be made upon a proper showing after verdict, but before the final judgment.

At common law the court had power, in the furtherance of justice, to allow amendments to be made after verdict, until final judgment, and it is not reasonable to suppose that the code intended to restrict this power. See Ency. of Plead. and Prac., Vol. 1, pages 604 and 605. *Boyd v. Smith*, App. court (Ind.), 39 N. E. 208. Elliott App. Proced., section 607.

The amendment did not substantially change the claim or issue in the case. It resulted in adding only to the complaint a material averment to conform it to the evidence. The record does not disclose that the appellants were in any way deceived by the amendment, or prejudiced in their rights thereby. No proof was made or

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offered by them tending to show that they were in any manner misled or prejudiced by this action of the court. Under such circumstances it is settled that the complaining party cannot be successfully heard in this court relative to the ruling in permitting the amendment. *Child v. Swain*, 69 Ind. 230, and cases there cited. *Stanton v. Kenrick*, 135 Ind. 382. There is no available error in allowing the amendment in question. The broad rule laid down in the case of *Heddens v. Younglove*, 46 Ind. 212, to the effect that the court possesses no power to permit an amendment to be made after verdict, is not tenable, and that decision must be held to be overruled to that extent.

Appellants concede that under the rules by which this court is controlled there is no such error as would justify a reversal of the judgment for want of evidence, or for the reason that it is contrary to law. They, however, insist that certain instructions, relative to undue influence and fraud, were not applicable to the evidence upon this subject. In this, counsel are mistaken, as there is evidence both direct and circumstantial, tending to support this issue to which these instructions were applicable. The fifth and sixth instructions are criticised for the reason, as claimed, that they are not limited in their terms to the particular acts of fraud or undue influence set forth in the complaint. By the fifth instruction the court gave to the jury the law in general, relative to undue influence, and what were sufficient acts under certain circumstances to avoid a deed.

By the sixth the court instructed the jury as to how they should apply the law to the evidence in support of the alleged undue influence. Both of these instructions were proper and correct.

By the tenth instruction the court informed the jury that if it was proved by a preponderance of the evidence,

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that the grantor at the time he executed the deed did not possess that degree of mental capacity which would enable him to understand and act with discretion in the ordinary affairs of life, then the deed should be set aside.

Appellants contend that this instruction did not state the correct test of unsoundness of mind. It has been recognized by the decisions of this court that where there is an essential privation of the reasoning faculties of the person in question, or an incapacity of understanding, and acting with discretion in the ordinary affairs of life, he is, in that event, a person of unsound mind.

And where it is shown that such mental incapacity existed at the time of the execution of the deed or contract controverted, it is sufficient to avoid the same. This seems to be the true test, and correct rule, adhered to by the decisions of this court. *Somers v. Pumphrey*, 24 Ind. 231 ; *Darnell v. Rowland*, 30 Ind. 342. Clark Const., section 141. Ewell Lead. Cases, foot note to page 558.

The instruction complained of substantially stated a correct exposition of the law relative to the degree of insanity sufficient to set aside the deed in controversy.

The next proposition presented, arising out of the alleged error in overruling the motion for a new trial, is the court's refusal to submit to the jury interrogatories three, four, five and six requested by appellants. The first, second and seventh interrogatories requested by them, relative to the execution of the deed having been procured by undue influence, and as to the persons who exercised said influence, and embodying the facts pertaining to the grantor's mental capacity, or ones equivalent thereto, were submitted to, and answered by the jury.

By the third interrogatory the jury was asked to

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specifically find “how much influence was exercised,” and it is obvious, we think, that this was properly rejected. Had the fourth, fifth and sixth been answered by the jury, they would have exerted no influence upon the final result or decision in the case, and for that reason alone, there was no prejudicial error in the court’s refusal to submit them. Elliott App. Proced., section 651.

The court did not err in overruling the motion in arrest of judgment. We have not considered the question raised by appellee to the effect that the evidence is not in the record, but in our consideration of the points involved, dependent upon it, we have treated it as being properly before us.

No error being disclosed by which the substantial rights of appellants were prejudiced, the judgment is affirmed.

Filed October 29, 1895.

No. 17,576.

ZEIS v. PASSWATER.

ELECTIONS.—Evidence.—Ballots Properly Preserved.—Memorandum Omitted from Tally Sheet.—The omission from the tally sheet of the memorandum required by section 6248, R. S. 1894, as to disputed ballots, does not preclude a ballot preserved in the manner provided by that section for the preservation of disputed ballots, from admission in evidence.

SAME.—Ballot.—Distinguishing Mark.—A distinct mark, as with a pencil, about one-fourth inch in width and about five-sixteenths inch in length, on one of the large squares of a ballot, is a distinguishing mark within the election law of this State. (See note at end of opinion.)

SAME.—Ballot.—Distinguishing Mark.—That the impression of the stamp within the square on a ballot, containing the voter’s party

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143	39
142	375
155	43
156	357

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emblem, is somewhat blurred, as if made by a tremulous hand, does not require the exclusion of the ballot as containing a distinguishing mark, under the election law of this State.

SAME.—Ballot.—Distinguishing Mark.—Two entirely separate and distinct impressions of the stamp within the square, on a ballot, containing the emblem of the voter's party constitute a distinguishing mark within the election law, invalidating the ballot.

APPELLATE PROCEDURE.—Elections.—Evidence.—Original Ballots.—When Part of Record.—Original ballots introduced in evidence accompanying and properly identified by the longhand report of the evidence incorporated into the bill of exceptions, will be treated by the appellate court as embraced within, and constituting a part of, such report.

From the Hamilton Circuit Court.

T. J. Kane, R. K. Kane, J. A. Roberts and M. Vestal, for appellant.

J. F. Neal, W. Fertig and H. J. Alexander, for appellee.

HACKNEY, J.—The appellant and the appellee were opposing candidates at the November election in 1894, for the office of township trustee. Upon the face of the election returns, the appellant received 197 votes and the appellee 196 votes, the former being declared elected. The appellee, before the board of county commissioners, contested the election of the appellant and obtained the decision of said board that he, the appellee, had received the highest number of legal votes. From that decision this appellant appealed to the circuit court, where, upon a trial of the issue, it was adjudged that each of said candidates had received an equal number of votes, and therefore that neither had been elected. The questions here involved relate to the validity of ten disputed ballots, nine of which were rejected by the election board of the east precinct and one was counted, in the west precinct, for the appellee. Of the nine rejected ballots,

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the circuit court counted four for the appellee and three for the appellant, rejecting two ballots of the five ballots stamped within the square containing the emblem of the party upon whose ticket the appellant was a candidate. The tenth disputed ballot, or that which was counted by the election board for the appellee, was held by the court not to be admissible in evidence. It will be seen, therefore, that, conceding the seven disputed ballots counted by the court to have been valid, if either of the two ballots rejected by the court was valid, or if the ballot not admitted in evidence was admissible and was invalid, the appellant would prevail by a majority of one, while if both rejected ballots should have been counted his majority would have been two, and if both rejected ballots were invalid, and that excluded from the evidence was admissible and was invalid, the appellant would have received 200 legal votes and the appellee 199 legal votes. Of the seven ballots counted there is little question. The four stamped within the square containing the emblem of the appellee's party each contained but one impression of the stamp. That impression, however, was, in one instance, not very clear and distinct, yet discernible, while in each of the others it was somewhat blurred, as if made by a tremulous hand. Of the five stamped within the square containing the emblem of the appellant's party three were of the same character as the three last above described, while the other two contained each two entirely separate and distinct impressions of the stamp. These, it is conceded, were the two rejected by the circuit court. They were invalid as containing distinguishing marks, and were properly rejected. *Sego v. Stoddard*, 136 Ind. 297 (22 L. R. A. 468). The seven counted contained no distinguishing mark. If, in preparing the ballot, the voter manifestly endeavors in

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good faith to comply with the requirements of the law, he should not suffer the loss of his vote. *Bechtel v. Albin*, 134 Ind. 193. Where, however, in the preparation of the ballot, there is such departure from the strict letter of the law, as that if purposely done, the ballot could be known by the voter, after casting it, such departure distinguishes the ballot within the meaning of the law, and this is true, even if the departure is made innocently. In our opinion the slight variation from the placing of the stamp with such precision as to make a single perfect impression was not fatal to these ballots.

To this point we have concurred with the trial court in concluding that upon the returns, adding the nine rejected ballots, each candidate had two hundred votes. It now remains but to determine whether the court erred in holding that the tenth ballot was not competent evidence, and whether the ballot was valid. The tally sheet of the west precinct was admitted in evidence. It contained a memorandum that five township ballots were mutilated and destroyed, but it contained no memorandum of disputed ballots. The appellant introduced in evidence the envelope in which the seals and alleged disputed ballots were contained. It was indorsed as follows :

“For marked, mutilated or otherwise defective ballots and seals of ballot packages, as required by section 52, election law.

“To the county clerk: This envelope contains the seals and one disputed ballot, marked: ‘Mutilated or otherwise defective ballots.’ The condition of seals of ballot packages, at the time of opening same, was good, as indicated by the inclosed seals.

“AARON SHOEMAKER, Inspector,
“Clarksville Precinct, West Wayne Township.”

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After the introduction of this certificate, it was proven by the evidence of a poll clerk, that the ballot in question was considered by the election board and was counted. It was then proposed to be proven by said witness that this ballot was taken from the ballot box in the regular course of the counting; that when so taken from the ballot box two members of the board objected and protested against the counting of the ballot, and that over such objection and protest the ballot was counted for the appellee; that by agreement of the members of the election board said ballot was placed in the disputed ballot envelope and was certified to the clerk of the circuit court. Upon objection by the appellee, the offered evidence was rejected.

It was further offered by the appellant to prove by said election clerk, by the clerk of the circuit court, and by the county auditor, that the envelope containing said ballot and the seals had been regularly deposited by the election inspector, with the county clerk, and had passed to the auditor, and had come to the lower court at the trial, from the auditor, and that the ballot offered on the trial was the ballot considered by the election board. This offer was objected to by the appellee and the objections sustained. The ballot in question was then offered in evidence, and was rejected by the court. It was so stamped as to constitute a vote for the appellee, but, besides one or two very delicate lines from imperfections in the paper, or made with a pencil, it showed, within one of the large squares, a distinct marking, as with a pencil, about one-fourth of an inch in width and about five-sixteenths of an inch in length. This latter marking would constitute a distinguishing mark, within the rule already announced, and would render the ballot invalid. Questions are discussed as to the sufficiency of the inspector's certificate of the alleged dis-

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puted ballot, without a memorandum thereof upon the tally sheet, and as to the admissibility of parol evidence to trace and identify the ballot, notwithstanding the omission of such memorandum.

It is provided by statute (R. S. 1894, section 6248; Elliott Sup., 1374) that "Any ballot which shall bear any distinguishing mark or mutilation shall be void and shall not be counted: * * *Provided, however,* that on protest of any member of the board such ballot and all disputed ballots shall be preserved by the inspector, and at the close of the count placed with the seals of the ballot packages in paper bags, securely sealed, and so delivered to the clerk of the county with notification to him of the number of ballots so placed in such bags, and of the condition of the seals of the ballot packages. The poll clerk shall also record on the tally-sheets, memoranda of such ballots and the condition * * of the ballot packages, and in any contest of election such ballots and seals may be submitted in evidence."

Besides the declaration of the invalidity of certain ballots, this statute provides a method of securely preserving such ballots for evidence in contests. The ballot in question was void, and should not have been counted for the appellee. In counting it the board violated a mandatory provision of the statute. By counting it for the appellee he would be given an office to which he was not elected by a majority of the legal votes cast, and the appellant would be deprived of an office to which he was elected by a majority of the legal votes. This result, it is contended, must prevail because of the failure, innocently we must presume, of the poll clerk to record on the tally sheets a memorandum of such ballot. If this result may be enforced, the legal choice of the voters of a precinct may be

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defeated either by the unintentional or the willful omission of an official duty devolving upon a member of the election board. We cannot believe that the Legislature intended that the will of the legal voters should be thwarted by such an omission.

That the disputed ballot shall not be destroyed, but shall be preserved for judicial investigation, is a duty primarily resting upon the inspector. He takes charge of it, places it in the bags with the seals, securely seals the bag, indorses upon that a notification to the county clerk of the number of ballots it contains, and then delivers the bag to said clerk. The memorandum which the poll clerk is required to make answers as a check, to some extent, upon the inspector and the county clerk against substituting other ballots for any that may be disputed. The seals upon the bag aid the inspector in detecting any change of the ballots after they have passed out of his hands. These are precautionary measures, and do not deny a resort to parol evidence to support or deny the genuineness of the ballots in dispute. The fact that a ballot is returned, and is not destroyed by burning, corroborates the theory of a dispute as to its validity. If one is returned, there is no provision of the statute denying the resort to parol evidence that it is not genuine, but is one which has been substituted for that which was really in dispute. These considerations lead to the conclusion that the Legislature did not intend that the requirement that the poll clerk should record on the tally sheet a memorandum of the disputed ballots should be mandatory. The conclusion reached by this court in *Parvin v. Wimberg*, 130 Ind. 561 (15 L. R. A. 775), a case involving provisions of this present election law, was that, "If a statute simply provide that certain things shall be done within a particular time or in a particular manner, and does not

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declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory if they do not affect its merits."

While the provision in question was designed to be followed by poll clerks, it was not, in our opinion, intended that a failure to do so should deny inquiry into the validity of ballots returned by the inspector, though it should involve the responsibility of the officer who neglects his sworn duty. We conclude, therefore, that, *prima facie*, the ballot was admissible in evidence, and its genuineness was open to inquiry upon parol evidence.

Appellee's learned counsel have made the question that the evidence is not in the record, because the longhand manuscript of the stenographic report of the evidence contains the original ballots and not transcriptions thereof. This question has been decided against the contention of counsel, in the case of *Indiana, etc., R. W. Co. v. Quick*, 109 Ind. 295, where it was said: "The longhand report of the evidence before us is not, and does not purport to be, a transcript of the evidence introduced at the trial. It is, under section 4010, R. S. 1881, an original manuscript or document incorporated in the bill of exceptions. It follows that original papers read in evidence, and accompanying and properly identified by such longhand report, may be treated in this court as embraced within, and constituting a part of it. The exhibits in question are, consequently, before us as a part of the evidence," etc.

It may be further suggested that in the present case the original ballots were, by order of the lower court, duly entered of record, made a part of the record, and were embodied in the longhand manuscript of the evidence.

For the error suggested, the judgment of the circuit

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court is reversed, with instruction to grant the appellant's motion for a new trial.

Filed October 29, 1895.

NOTE.—The authorities upon the effect of marks or devises to distinguish ballots are found in a note to *Rutledge v. Crawford* (Cal.), 13 L. R. A. 761, and in the later cases of *Tebbe v. Smith* (Cal.), 29 L. R. A. 673, and *Dennis v. Caughlin* (Nev.), 29 L. R. A. 781, and cases referred to in foot note thereto.

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RAILROAD COMPANY ET AL.

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RAILROAD.—*Consolidation with Corporations of Other States.—Notice of Meetings of Stockholders.*—It is not essential to the validity of the determination of a railroad company in Indiana to consolidate with other companies in other States, that the stockholders should be called together by the notice, and conduct their meetings by the methods prescribed by the laws of such other States, under sections 5257, 5262, R. S. 1894, providing for consolidation of railroad corporations in Indiana with railroad corporations of other States, upon such terms as may be mutually agreed upon in accordance with the laws of the adjoining States, with whose roads connections are thus formed.

SAME.—*Directors.—De Facto Officers.—Unconstitutional Act.*—Persons elected directors of a railroad corporation under an unconstitutional act, are *de facto* officers as to acts done by them under color of their office before the unconstitutionality of the act has been declared. (See note at end of opinion.)

SAME.—*Stockholder.—Consolidation.—Validity Of.—Estoppel.*—A stockholder of a constituent railroad corporation, who participated in the acts of the corporation, by which it agreed to and effected a consolidation with other companies, is estopped to deny the validity of the consolidation.

SAME.—*Consolidation.—Estoppel.—Notice.*—The effect of participation in proceedings for the consolidation of railroad companies, and acquiescence in such consolidation, to estop a constituent company to deny the validity of the consolidation as against the public pur-

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chasers from the consolidated company, and mortgage bondholders of the latter, cannot be avoided because of a notice given by one of its stockholders at the time of its sale, asserting the invalidity of the consolidation, but not pointing out any defects other than those which both he and the company were already estopped to assert.

SAME.—Consolidation.—Estoppel.—A constituent railroad corporation is estopped to question the validity of a consolidation formed by it, with other corporations, where it participated in every step essential to the creation of a *de facto* corporation, by consolidation, and has stood by for years, permitting mortgage foreclosures as upon its property, permitting purchasers to acquire supposed titles, and new corporations to form, to purchase, to consolidate with still other corporations, and large sums to be expended in improving the road, and has suffered mortgage bonds to be issued and put upon the market—all without question.

SAME.—Consolidation.—Presumptive Evidence.—It will be presumed, in an action attacking the validity of a consolidation of railroad corporations, that the requisite stock to effect such consolidation was voted by a constituent corporation, where no issue in that respect is raised, under section 5147, R. S. 1894, giving directors of railroad companies power to enact by-laws governing the disposition of stock, property, and business of the company.

From the Grant Circuit Court.

Woollen & Woollen and *G. A. Henry*, for appellant.

J. M. Butler, *C. G. Guenther* and *S. O. Bayless*, for appellees.

HACKNEY, J.—The appellant, Moses Bradford, sued the Frankfort, St. Louis and Toledo Railroad Company, Sylvester H. Kneeland, The Bluffton, Kokomo and South Western Railroad Company, and the Toledo, St. Louis and Kansas City Railroad Company, on the 14th day of April, 1886. By cross-complaint the Frankfort, St. Louis and Toledo Railroad Company alleged, against her co-defendants, substantially the same facts pleaded in the complaint. The relief sought in each, said complaint and cross-complaint, was to declare the invalidity of a consolidation of the Frankfort, St. Louis and Toledo

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Railroad Company, the Toledo, Delphos and Burlington Railroad Company, and the Toledo, Cincinnati and St. Louis Railroad Company, to adjudge the invalidity of certain stock and bonds of the first named company and for the appointment of a receiver for said company. The alleged interest of Bradford was as a stockholder of the Frankfort, St. Louis and Toledo Railroad Company whose stock had been depreciated by the alleged consolidation and the interest of the cross-complainant was in establishing her franchises and property rights, of which she alleged she had been deprived by said alleged consolidation. The theory of each, the complaint and cross-complaint, was that said consolidation was invalid, *first*, because of the reduction, on May 11, 1880, of the number of directors of the Frankfort, St. Louis and Toledo Railroad Company from thirteen to five, said reduction having been made at an annual meeting of the stockholders convened pursuant to notice, but not of notice that such change was contemplated, and because a reduction of directors to five in number was authorized only by an act of the Legislature, approved June 17, 1852 (R. S. 1881, section 3891), which was unconstitutional by reason of the failure of the title to state the object of the act, the board so elected having negotiated and participated in the consolidation; *second*, that the three lines attempting consolidation were parallel and competing lines and did not cross or intersect, the constitution and laws of Illinois, in which State one of such lines was organized, forbidding the consolidation of competing lines; *third*, that the Frankfort, St. Louis and Toledo Railroad Company was represented in said attempted consolidation by less than a majority of its board of directors, considered either as thirteen or five, and by directors who had conspired with the other constituent companies to fraudulently deprive said company of its

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franchises, right of way and property; *fourth*, that the articles of consolidation did not comply with the laws of Ohio, Indiana and Illinois, the respective States of the incorporation of said companies, in the requirements of fifteen directors and as to notice to stockholders and proceedings following the agreement of consolidation; *fifth*, that a notice, not signed by the secretary or a majority of the directors was given of a meeting of the stockholders of said Frankfort, St. Louis and Toledo Railroad Company on February 21, 1882, to ratify and confirm the articles of consolidation of said companies; that of the 13,214 shares, entitled to vote at such meeting, but 12,867 shares were represented and voted, and that said meeting was held at an office different from that named in the notice; and, *sixth*, that the corporate seal of the cross-complainant was not affixed to said articles, and they were not signed by its legal president and secretary, and no certificate was endorsed by the several secretaries of the companies upon said articles, nor affidavits made by the presidents, that the articles were adopted by a two-thirds vote, and such certificate filed in the offices of the secretary of State and the several recorders.

The principal question before this court arises upon the ruling of the circuit court in overruling the demurrers of the appellants, Bradford and the Frankfort, St. Louis and Toledo Railway Company, to the affirmative answers of the appellees to the complaint and cross-complaint. The answer to the complaint alleged the presence, active participancy, and concurrence of Bradford in the meetings of the stockholders of May 11, 1881, and February 21, 1882, that he voted to change the number of directors, voted for the five chosen, voted for the consolidation and voted to confirm the consolidation agreed upon. It was alleged in both the answer to the complaint and

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that to the cross-complaint, that the companies consolidating had not constructed parallel lines but merely had them in contemplation ; that notice of the stockholders' meeting of February 21, 1882, was duly published for more than thirty days previous to such meeting, in newspapers of general circulation in the counties through which the Frankfort, St. Louis and Toledo Railroad was constructed and contemplated, that said notice specified, as one of the objects of the meeting, the purpose to take action upon the proposed consolidation, and that said notice was signed by the secretary of said company ; that said meeting was held at the time and place designated in the notice ; that 13,214 shares of stock were authorized to be voted at said meeting and that 12,867 shares were represented and voted ; that the shares so represented were voted unanimously in favor of such consolidation and in favor of directions to the president and secretary of the company to execute the articles of consolidation reported and considered by the meeting ; that said articles of consolidation were executed as directed, and were acquiesced in by all parties for six years before this suit was instituted.

It is further alleged, in each of said answers, that H. R. Low & Co., a railway construction company, by contract with the Frankfort, St. Louis and Toledo Railroad Company, had agreed to construct a line of railway from Warren, Huntington county, to Kokomo, Howard county, for a stated sum per mile, for all of the stock in said company, excepting the stock to issue to localities voting aid to such construction, and for certain first mortgage bonds of said railway company ; that pending such contract, and while said railway was under construction, the construction company contracted with the Toledo, Delphos and Burlington Railway Company, to construct, for said latter company, a railway over the same line,

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which railway had theretofore been in contemplation as a part of that company's railway, to transfer to said railway company all of the capital stock and mortgage bonds of the Frankfort, St. Louis and Toledo Railway Company, all to be paid for by said Toledo, Delphos & Burlington Railroad Company, as agreed; that in and for the subsequent construction of said line the last named company paid large sums of money, and became the owner of said stock and bonds, and upon the completion of the railway, the possession thereof was delivered to said last named company; that the money, so expended by the Toledo, Delphos and Burlington Railroad Company, was raised by a mortgage, on January 17, 1880, of its line of railway, so theretofore constructed, and as contemplated, including the said line from Warren to Kokomo; that upon default in the interest upon said latter mortgage, and during the months of November and December, 1885, and March, 1886, there were foreclosures, sale and deeds rendered and executed for the Toledo, Delphos and Burlington Railway, from Toledo, Ohio, to Kokomo, Indiana, covering and including the line claimed to have been owned by the cross-complainant; that the said Kneeland purchased and became the owner of said lines of railway, and sold the same to the appellee corporation, the Bluffton, Kokomo and Southwestern Railroad Company; that the Bluffton, Kokomo and Southwestern Railroad Company was thereafter legally consolidated with certain other railroad corporations, and thereby formed the Toledo, St. Louis and Kansas City Railroad Company, appellee, and that said Kneeland and said last named company have expended large sums of money upon said railway, between Warren and Kokomo, in extending it from a narrow to a broad gauge line, and for such purpose have issued mortgage bonds thereon, all with the knowledge and

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entire acquiescence of the complainant and the cross-complainant, until this suit was instituted.

The sufficiency of the notice of the stockholders' meeting of May 11, 1881, and whether the act of the Legislature of June 17th, 1852, is constitutional, would seem to be wholly immaterial, if the directors, consisting of five members, were *de facto* officers, or if the action of the stockholders, in the meeting of February 21st, 1882, had the effect to bind the Frankfort, St. Louis and Toledo Railroad Company by the articles of consolidation. And, it would seem that, whether the act in question was constitutional, or whether the Frankfort, etc., company was estopped by the action of ninety-seven *per centum* of its stock, in making the consolidation, directed February 21st, 1882, the appellant, Bradford, by his participation in all of the proceedings, which he characterizes as fraudulent and without authority, and in which he acquiesced for nearly six years, and until new rights attached and large investments are made, should have no standing to claim the overthrow of his own action.

Our first inquiry, therefore, will be as to the validity of the action of the stockholders of the Frankfort, St. Louis and Toledo Railroad Company, of February 21st, 1882. The meeting was called by thirty days' publication of the time, place, and object thereof; ninety-seven *per centum* of the capital stock was represented at, and voted in favor of, the consolidation, and directed the president and secretary to execute the articles of consolidation, which were read to, and approved by, the meeting, and said articles were executed by said officers, as directed. By section 3893, R. S. 1881, (section 5143, R. S. 1894), it is provided that special meetings of the stockholders may be called at any time, "by giving thirty days' public notice, of the time and place of the meeting, * * in a newspaper published in each county

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through which such road shall be intended to run." The answers alleged a compliance with these provisions. Neither the complaint nor the cross-complaint alleged the nonexistence of by-laws, or that under by-laws the number of shares voting for the consolidation were less than the number required by the by-laws, and the issue was not, therefore, tendered for response by the answer. Under section 3897, R. S. 1881 (section 5147, R. S. 1894), the directors of railway companies possessed power to enact by-laws governing the disposition of stock, property, and business of the companies. There being no such issue, we must presume that the requisite stock was voted.

Much of the contention of the appellants rested upon the assumption that, under the laws of Illinois, and of Ohio, the action of the stockholders of the cross-complainant, on the 21st day of February, 1882, was invalid, because of the failure, in obtaining the consent of such stockholders to said consolidation, to observe such laws in the notice of the meeting, and in other respects relating to the separate action of said company. This assumption arose upon sections 3971, 3975, R. S. 1881; sections 5257, 5262, R. S. 1894. These sections gave power to the Frankfort, St. Louis and Toledo Railroad Company to consolidate and merge its stock with that of any other company, making of such consolidated companies one joint stock company, "upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State, with whose road or roads connections are thus formed." We do not believe that it was the legislative intention, in this provision, to incorporate by reference the laws of Illinois and Ohio as a part of our law for the determination of the distinct rights, powers and privileges of an Indiana railway company. We cannot concur in the theory that this enactment was intended to provide that, when

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stockholders of an Indiana company desired to agree among themselves that their company should consolidate with other companies in Illinois and Ohio, they should be called together by the notice, and conduct their meeting by the methods prescribed by the laws of such other States. So far as the question of consolidation affected alone the Indiana company, and the steps by which it should obtain the concurrence of its own stockholders, we have no doubt the Legislature never intended to subject such company to the provisions of the constitution and laws of States, other than Indiana. If we are correct in this conclusion, the words, "in accordance with the laws of the adjoining State," as found in section 3971, *supra*, were intended to qualify the general power of consolidation, to the extent that such consolidation, or the "*terms*" of the mutual agreement of consolidation, be not in conflict with the laws of adjoining States. Certainly, the several constituent companies could not be interested in the method by which each secured the concurrence of its stockholders, provided only that such concurrence was sanctioned by the laws of the State of the company whose stockholders so concur, and, most certainly, Indiana would not be interested in abandoning her own laws for the government of her corporations, and in substituting the laws of another State, when the question of government was one in respect, to which Indiana alone would be interested.

Up to the point of consolidation there was no irregularity, or possible invalidity, of the proceedings of the Indiana corporation, unless it arose from the alleged want of authority in the board of directors, consisting of five members, to call the meeting of February 21, 1882. The statute directed the call by the board and it is alleged in the answers, that the call was by order of the board. If, from the want of power to constitute a

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board of five members, the acts of those chosen were void, it is regarded as exceedingly doubtful, if the action of the stockholders would not bind the corporation, and the participating stockholder, Bradford, against all the world, save, possibly, the few shares of stock not present and participating in the meeting. Notice is required for the benefit of the stockholders, and is not so imperative that the stockholders themselves may not waive it. In Green Brice's *Ultra Vires* it is distinctly laid down, that: "Preliminaries, such as the issuing of formal notices, the publishing of advertisements, and the like, prior to meetings; and regulations relating to the manner of conducting such meetings," are requisites merely directory, p. 520, and authorities cited on p. 522. But we need not place the decision of the question upon the doctrine of waiver, or that the requirements were directory. If, conceding for the purposes of the inquiry the act of June 17, 1852, was unconstitutional, and there existed no power to reduce the number of directors from thirteen to five, we must at least assert that there was colorable authority for the proceeding, and that, until the law should be declared unconstitutional, the acts of those chosen under such colorable authority would be the acts of *de facto* officers. See *Parker v. State, ex rel.*, 133 Ind. 178 (18 L. R. A. 567), and authorities there cited; also *Roberts v. Hill*, 137 Ind. 215; *Boone Corp.*, section 140; *Wood Railway Law*, Vol. 1, section 148; *Morawetz Private Corp.*, Vol. 2, section 638; *King v. Bedford Level*, 6 East, 356. In the last cited case Lord Ellenborough gave the following definition: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."

In the present case the corporation, upon the letter of the statute, elected five directors, and turned over to

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them its affairs, and permitted them to transact its business without denial or question. They were *de facto* officers, even if we were required to hold the law of June 17th, 1852, unconstitutional. We do not, however, pass upon the validity of that law.

But, conceding the existence of the irregularities in the proceedings of the consolidation, though none occur to us to affect the validity of the consolidation, we are confronted with the proposition that the present company, and we may say the same of the organization by consolidation, is a *de facto* corporation, sustaining an important relation to the public and exercising powers and privileges under the laws of the State, with the acquiescence of the authorities of the State. Such being the case, can a constituent corporation, complaining of such irregularities, attack and overthrow the *de facto* corporation, thereby dissolving such corporation, dislodging the interest of the public and condemning the corporate rights of that corporation? The interests of the public forbid it, and, if the irregularities complained of were *ultra vires*, the attempt to do so is but the usurpation of the exclusive prerogatives of the State. The corporation, the Frankfort, St. Louis and Toledo Railroad Company, occupied no better or different attitude than that occupied by Bradford. It participated in every step essential to the creation of a *de facto* corporation by consolidation, and it has stood by for years permitting mortgage foreclosures as upon its property, permitting purchasers to acquire supposed titles and new corporations to form, to purchase, to consolidate with still other corporations, and large sums to be expended in extending the gauge, suffering mortgage bonds to be issued and put upon the market, all without question. Leaving out of view the rights of stockholders not present at the 21st of February meeting, and offering no

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intimation as to their rights or as to the existence of an estoppel against them, we cannot avoid the conclusion that equity will not permit those who participated in the acts complained of to stand by, taking the chances of good or ill fortune from their acts, and then, when such acts have proven fruitless, to complain that such acts were irregular or even fraudulent and to seek relief therefrom. If equity will not so permit, the answers were good and the appellants must both fail. In *Swartwout v. Michigan Air Line Railroad Co.*, 24 Mich. 389, Judge Cooley said of this question: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation; it is plainly a dictate alike of justice and of public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as *corporators* or otherwise, that such questions should not be suffered to be raised." See also *Bates v. Wilson*, 14 Col. 140; *Merchants' and Planters' Line v. Wagoner*, 71 Ala. 581; *Goodrich v. Reynolds*, 31 Ill. 490; *City of St. Louis v. Shields*, 62 Mo. 247; *Boise City, etc., Co. v. Eben*, 1 Idaho, 790. If a stockholder participate in the transactions complained of, he will be denied relief. *Parsons v. Joseph*, 92 Ala. 403 (406); *Battelle v. North Western, etc., Co.*, 37 Minn. 89; *Venner v. Atchison, etc., R. Co.*, 28 Fed. Rep. 581; *Barr v. Pittsburg, etc., Co.*, 51 Fed. Rep. 33; *Rio Grande Cattle Co. v. Burns, Walker & Co.*, 82 Texas, 50; *Jones v. Milton, etc., Turnp. Co.*, 7 Ind. 547; *Judah v. American Live Stock Co.*, 4 Ind. 333.

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Many phases of the various questions involved in the record have been very fully and ably discussed by counsel, and while we do not follow them through each step in this contention, we think we have reached the essence of the issue and that all of the phases presented by counsel must inevitably fall within the principles which have controlled our conclusions, unless possibly it be that as to whether title to the property in question passed by and under the decree foreclosing the mortgage by the Toledo, Delphos and Burlington Railroad Company. As to that question, if we are correct in concluding that under the consolidation the property passed beyond the reach, in this suit, of the appellants, it becomes unimportant to inquire as to the effect of the foreclosure standing alone. In our opinion the judgment of the circuit court was clearly right, and it is affirmed.

Filed May 17, 1895.

ON PETITION FOR REHEARING.

HACKNEY, J.—The appellee the Frankfort, St. Louis and Toledo Railroad Company has presented an earnest petition for a rehearing. The only question presented which did not receive full consideration on the original hearing, is as to the effect of a notice given by Moses Bradford at the time of the foreclosure sale mentioned in the original opinion, to the purchasers, to the general effect that he held paid up stock in said company; that he had paid taxes voted in aid of the construction of said road; that the then existing consolidation of said company with the Toledo, Delphos and Burlington Railroad Company, and the Toledo, Cincinnati and St. Louis Railroad Company, was not legal and that he would “contest the validity” of the alleged consolidation. The effect of this notice, it is insisted, was to preclude the

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purchasers, the subsequent consolidated companies, the mortgage bond holders, and the public from asserting the estoppel held by us in the original opinion to be effective against this petitioner. At most, this general notice could not affect the public interests which are held of paramount importance. Nor are we advised of its effect upon subsequent investors by consolidation and by purchase of bonds who are not claimed to have been advised of it. The weakness of the notice is not alone in its failure to advise of a single instance in which any of the original proceedings for and of consolidation were irregular or invalid, but its further weakness is in the declaration of claimed rights, not of the petitioner but of Bradford, whose own participancy in the acts of which he complained were then known and have since been held to close his mouth to question their validity. As to the rights of the petitioner, and as to those of Bradford, we can as well say, the notice gave no warning not contained in the corporation records, as disclosed by the allegations of the answers. We are not advised by the record nor by argument of counsel that the Bradford notice put any one upon inquiry as to matters not apparent upon the face of the proceedings of consolidation, and, conceding that the petitioner may avail herself of Bradford's notice, its effect was but to advise of those things set up in the answers which we have held sufficient against the charge of invalidity. Above all, however, this notice could not excuse the petitioner against her six years of silence and inactivity which have permitted public interests to attach, which public interests, as we held in the original opinion, forbid the present attack upon the new corporation by consolidation.

This result was, we think, correctly reached upon the theory that it was unimportant whether the organization

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of the board of directors, consisting of five members, was valid or not, and whether their call of the stockholders' meeting was regular or not. It is therefore unimportant to consider now the regularity of that board's proceeding as insisted upon by the petitioner.

The petition for a rehearing is overruled.

Filed October 30, 1895.

NOTE.—The character of directors *de facto* in corporations is the subject of annotation to *Waterman v. Chicago & I. R. Co.* (Ill.), 15 L. R. A. 418.

No. 17,337.

STEELE v. EMPSOM.

COSTS.—Proportional.—Drainage Proceeding.—Appeal.—An appellant in a proceeding under the statutes of this State, for the establishment of a drain, who succeeds on appeal as to the one issue only, is not entitled to recover all her costs, but only a proportional part thereof.

DRAINAGE.—Statute Amended Pending Action.—Abatement.—A proceeding for the establishment of a drain, instituted under sections 4285–4317, R. S. 1881, did not abate upon the amendment of such sections, pending the proceedings, by the passage of the act of 1893, p. 329, but thereafter the proceedings were governed by the provisions of the amendatory act.

SAME.—Drain Across Railroad Right of Way.—Who May Object.—A property-owner cannot complain of the location of a public drain established under the statutes of this State, across the right of way of a railroad; but such objection must be made, if at all, by the railroad company.

SAME.—Questions Not Considered on Appeal.—Questions not properly presented to the board of commissioners in proceedings for the establishment of a drain cannot be raised upon appeal to the circuit court, unless they go to the jurisdiction over the subject-matter.

142	397
144	79
145	144
142	397
148	316
149	176
151	656
142	397
154	238
155	658
156	264
156	267
156	272
142	397
158	163
158	164
142	397
163	235
163	486
142	397
165	25

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SAME.—*Assignment of Error.*—*Remonstrance.*—*Pointing Out Items on Which Evidence Will Be Admitted.*—*Practice.*—No question is presented by an assignment that the court erred in indicating certain items in a remonstrance in a proceeding for the establishment of a drain under the statutes, upon which the remonstrants would not be permitted to introduce evidence; but the question of the admissibility of evidence as to such items must be raised by an offer of evidence and an exception to the refusal to admit the same.

EMINENT DOMAIN.—*Appropriating Public Property to a Second Public Use.*—The rule that property appropriated to one public use cannot be appropriated to another public use, applies only when the second public use will naturally injure or destroy the first public use.

JUDGMENT.—*Drainage.*—*Finding.*—*Collateral Attack.*—A finding of the board of commissioners in a proceeding for the establishment of a drain, that the notice required by section 5663, R. S. 1894, was given, and the judgment of affirmance in the circuit court, are conclusive as against a collateral attack, where some notice was in fact given.

VERDICT.—*Informality.*—A verdict is not bad for informality if the court can understand it.

From the Jackson Circuit Court.

Burrell & Branaman, for appellant.

Applewhite & Applewhite and *W. K. Marshall*, for appellee.

MONKS, J.—On the 14th day of December, 1892, appellee filed his petition before the board of commissioners of Jackson county, praying for the establishment of a drain under the provisions of the act approved April 21st, 1881, Acts 1881, p. 410, sections 4285, 4317, R. S. 1881. Viewers were appointed by the board on the same day to report before the next term. At the March term, 1893, of the board, the viewers not having filed any report, the case was continued until the next term. Sections 2, 8 and 9, being sections 4286, 4292 and 4293, R. S. 1881, of the drainage act, under which this proceeding was brought, were amended by an act which took effect March 4, 1893. Acts 1893, p. 329,

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sections 5656, 5662, 5663, R. S. 1894. By the amended sections it was provided that the benefits to public highways should be assessed to the township, and paid out of the road fund, while the original section provided that the benefits should be assessed to the county. The amendatory section provided that the notice given should be by publication, while the section amended provided that it should be by posting. On April 8th, 1893, the viewers filed their report, and at the June term of the board, appellant filed a motion to continue the cause for the reason that proper notice had not been given to the owners of the land assessed for benefits, which motion the board sustained, and continued the case "for publication of the notice as the law now requires." At the next term of the board in September, proof of publication of notice in a newspaper was made, and thereupon appellant filed her remonstrance, and reviewers were appointed, who reported at the December term, 1893, approving the action of the viewers in all things, and the board entered an order establishing the ditch. Appellant appealed to the circuit court, and there filed a plea in abatement in which it was alleged "that the court had no jurisdiction for the reason that this proceeding was commenced under the old law, and, since that, the statute has been amended by the Legislature of 1893, changing the liability of certain parties to the assessment, and there is no provision saving pending cases." A demurrer for want of facts was sustained to this plea.

Appellant then orally moved the court to strike out the report of the viewers for the reason stated by appellant, "that Morris B. Singer, after his appointment as such viewer by the board, and before the report was filed, became one of the sureties on the bond of the petitioner for the payment of the costs and expenses in said proceeding, and thereby became interested and not com-

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petent to act as viewer," which motion the court overruled. Thereupon appellant filed his written motion to dismiss the cause. This motion was also overruled. The cause was tried by a jury, a verdict returned, and over a motion for a *venire de novo*, and a motion for a new trial, judgment was rendered establishing the proposed work. Appellant also moved the court to modify the judgment, which was overruled. Exceptions were properly reserved to all the rulings of the court.

The first error assigned is, "that the court erred in sustaining the demurrer to the answer in abatement." Appellant contends that when the act of 1893, Acts 1893, p. 329, sections 5656, 5662, 5663, R. S. 1894, took effect, the jurisdiction of the board of commissioners was ousted, for the reason that said act contained no provision saving pending cases, and that, therefore, the court erred in sustaining the demurrer to the plea in abatement.

The act of 1893, *supra*, did not oust the jurisdiction of the board of commissioners over said cause, but the same from the time said act took effect was governed by its provisions, and it was necessary that all steps taken, and proceedings had after that time should comply with the requirements of said act. The report of the viewers was filed April 8, after said act was in force, and should have conformed to all the requirements thereof. At the June term of the board of commissioners, on motion of appellant, the case was continued that notice might be given as required by said act. At the September term of the board, proof was made, and the board found that notice had been given as required by said act, and thereupon appellant filed her remonstrance. It is not shown that any provision of the amendatory act was not complied with. There was no error in sustaining said demurrer.

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The second error assigned is, that the court erred in overruling appellant's motion to reject and strike out the report of the viewers. The reasons assigned for the motion have been heretofore stated. At the time the viewers were appointed, Singer was not on the bond named, and it is not claimed that he was not then a disinterested person. The report was filed April 8th, and on the same day the bond was filed. This court cannot say, from the record, which was filed first, or that the bond was not signed and filed after the report was signed and filed. No motion was made by appellant to reject or strike out the report before the board of commissioners for this cause. The objection, therefore, if tenable when properly raised, was waived. It is a well-settled rule that questions not properly presented to the board of commissioners, except such as go to the jurisdiction over the subject-matter, cannot be made for the first time in the circuit court. *Budd v. Reidelbach*, 128 Ind. 145, and cases cited on p. 147; *Metty v. Marsh*, 124 Ind. 18, and cases cited on p. 24.

The motion was properly overruled.

The third error assigned calls in question the action of the court in refusing to sustain appellant's motion to dismiss the cause. This motion sets out six reasons why said motion should be sustained. None of them are jurisdictional, but if true are mere irregularities, which would not affect the jurisdiction of the court over the subject-matter. *Updegraff v. Palmer*, 107 Ind. 181, and cases cited on p. 185.

Besides, no such motion was made before the board of commissioners, and the same could not therefore be made in the circuit court. *Budd v. Reidelbach*, and authorities cited, *supra*.

There was no error in overruling this motion.

The fourth error assigned is, "That the court erred in

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indicating on appellant's remonstrance, at the suggestion of appellee, which items therein he would permit appellant to give evidence to the jury." It is set forth in the bill of exceptions, "that after the jury had been sworn, and before any evidence had been given, appellee moved the court to indicate what items of the remonstrance evidence would be submitted to the jury upon, and to the motion of appellee, appellant objected, and, over the objections of appellant, the court indicated and said he would not permit evidence to be introduced to the jury to support items numbered 2, 3, 4, 5, 10, 11, 12, 13 and 14, to which appellant excepted."

No question is presented by this assignment of error. The items of the remonstrance were not stricken out. They remained a part of the remonstrance after the statement of the court, the same as before. The statement of the court that evidence would not be admitted under the items named was not a ruling to which an available exception could be taken. It amounted to no more than an announcement in advance of what his ruling would be if such evidence were offered. None was offered. The question could only be presented by an offer to prove facts in support of said items; if such evidence had been excluded by the court when properly offered, an exception could then be taken to the ruling of the court and not before. We have carefully examined said items, however, and think it would have been proper to have excluded such evidence if it had been offered. Said items either presented questions already determined by the court, and not triable by jury, or were causes of remonstrance which were more fully stated in other items than those named. The error, therefore, if any was committed, was harmless. For the same reason it would not have been error if the court had stricken out said items on motion.

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After the return of the verdict appellant filed a motion for a *venire de novo*, which was overruled by the court. The verdict of the jury is as follows:

“We, the jury, find that the ditch in controversy will be conducive of public health, convenience and welfare, and that the proposed route in the viewers’ report will be practicable, and that the assessments set out in said report are in proportion to the benefits to be derived from said ditch, except that the assessment against Mrs. Steele’s land is in excess of the benefits to be derived by her in the sum of \$20.00, and we assess her damages in that sum, and in all respects except the assessment of that amount of damages in her favor, we find generally in favor of Azariah Empson, and in favor of the construction of the ditch as specified in the report of viewers on file in this cause.

“LEROY M. MAINS, *Foreman*.”

An appeal lies from the orders of the board of commissioners, as provided by section 4301, R. S. 1881, section 5671, R. S. 1894, only in regard to the following questions:

“First.—Whether said ditch will be conducive to the public health, convenience or welfare.

“Second.—Whether the route thereof is practicable.

“Third.—Whether the assessments made for the construction of the ditch are in proportion to the benefits to be derived therefrom.

“Fourth.—The amount of damages allowed to any person, or persons, or corporation.”

The verdict finds specially upon each of the four questions stated, the only ones submitted to the jury. *Denton v. Thompson*, 136 Ind. 446 (457, 459); *Perkins v. Hayward*, 124 Ind. 445.

While the verdict might have been more definite and certain in regard to the question of appellant’s benefits

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and damages, yet it is easily understood. The rule is that a verdict is not bad for informality, if the court can understand it. It is to have a reasonable intendment, and is to receive a reasonable construction, and must not be avoided, except from necessity. *Polson v. State*, 137 Ind. 59; *Daniels v. McGinnis, Admr.*, 97 Ind. 549; *Chambers v. Butcher*, 82 Ind. 508. There was no error in overruling the motion for a *venire de novo*. *Denton v. Thompson, supra*, on p. 459; *Budd v. Reidelbach, supra*.

After the court overruled the motion for a *venire de novo*, appellant filed a motion "for judgment on the verdict discharging her property from the lien of the assessment for benefits, as made by the viewers, and for damages in the sum of \$20.00, and for her costs." This motion the court overruled.

It is clear, from the verdict, that the \$130.00 benefits assessed by the viewers was to stand and be paid by appellant, and that she was allowed \$20.00 damages. It follows that the appellant was not entitled to the judgment she asks the court, by her motion, to render.

Judgment was rendered on the verdict establishing "the proposed work, etc., and that appellant be allowed \$20.00, and that appellant recover of appellee three-fourths of his costs, and that appellee recover of appellant one-fourth of her costs, and that the viewers shall meet and apportion the payment of the \$20.00, as provided by section 4300, R. S. 1881; section 5670, R. S. 1894, and the amendments thereto."

Appellant moved to modify the judgment, so that she recover her cost, instead of one-fourth thereof. Appellant had only succeeded as to one issue, that of damages, while all the other issues were found against her. She was not, therefore, entitled to recover all her cost. *Rogers v. Venis*, 137 Ind. 221 (225); *Zigler v. Menges*,

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121 Ind. 99, and cases cited on p. 108; *Watkins v. Pickering*, 92 Ind. 332 (335).

One of the causes specified for a new trial is that the verdict is not sustained by the evidence. Although there is some conflict in the evidence, there is evidence which supports the verdict on every issue in the case, and under the firmly settled rule this court cannot reverse a case on the weight of the evidence. *Lawrence v. Van Buskirk*, 140 Ind. 481.

It is earnestly insisted by appellant that there was no proof that the notice required by section 3 of acts of 1893, p. 337 (section 5663, R. S. 1894), was ever given, and that, therefore, the verdict was not sustained by the evidence. The question of notice was not to be determined by the jury, but by the court. The board of commissioners found that proper notice had been given. No party to this proceeding, either before the board or in the circuit court, whether they remonstrated or not, can question the jurisdiction of the board or the circuit court. Appellant cannot question the jurisdiction, because she waived the defects in the notice, if any, by filing her remonstrance. The other parties cannot question the jurisdiction, for the reason that, as there was some notice, the finding of the board of commissioners that notice was given, and the judgment of the circuit court in the case, are conclusive in a collateral attack. *Perkins v. Hayward*, 132 Ind. 95 (103), and cases cited on p. 104; *Muncey v. Joest*, 74 Ind. 409.

It is claimed by appellant that the ditch is partly located on the right of way of the O. & M. R. W. Co., and that such location is not authorized, for the reason, that property once taken and appropriated to one public use cannot again be appropriated to another public use. Citing, *City of Valparaiso v. Chicago, etc., R. W. Co.*, 123 Ind. 467.

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The rule urged by appellant only applies when the second public use would naturally injure or destroy the uses for which such right of way was employed, and when the same could not exist without impairing the first uses. *Cincinnati, etc., R. W. Co. v. City of Anderson*, 139 Ind. 490, and cases cited on p. 492.

It is not claimed, nor does the evidence show, that the location of the drain upon the right of way would, in any way, interfere with the uses of the railroad company. On the contrary, it was found by the viewers, reviewers, jury, and adjudged by the lower court, that the same would be a benefit to said right of way. The railway company named was a party to the proceeding, and assessed with benefits, and raised no objection to such location or assessment. If it were conceded that such objection could be successfully made by the railroad company, it does not follow that appellant can do so. The rule is that appellant can only bring before the court such questions as affect her rights, not such as affect the rights of others. *Zigler v. Menges, supra*, on p. 108. The railroad company, having been a party to the proceedings, and having raised no objection to the same, cannot successfully assail such location of the ditch, even if erroneously made. *Perkins v. Hayward, supra*.

What we have said concerning the proof of notice and the location of the ditch on the right of way of the railroad company, disposes of the question presented by the court's refusal to give the instructions requested by appellant.

There is no available error in the record.

Judgment affirmed.

Filed October 30, 1895.

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No. 17,349.

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ET AL. v. BLUE.

142	407
143	684
143	407
146	392

142	407
168	489
168	490

142	407
e171	245

APPELLATE PROCEDURE.—*Appeal from Interlocutory Judgment.*—*Appointing Receiver.*—*Sufficiency of Complaint.*—The sufficiency of a complaint will not be considered upon appeal from an interlocutory judgment appointing a receiver as auxiliary to a pending action, further than to test its sufficiency so far as it relates to the appointment.

RECEIVER.—*Affidavit.*—*Sufficiency of Complaint.*—*Temporary Pending Suit.*—*Without Notice.*—A liberal construction will be given to a complaint in determining its sufficiency so far as it relates to the appointment of a temporary receiver pending the action, but it must state a cause for such appointment; and if the application is made without notice, the cause for an appointment without notice must appear either in the verified complaint or by affidavit, under section 1244, R. S. 1894, providing that a receiver shall not be appointed without notice of the application to the adverse party, except upon sufficient cause shown by affidavit.

SAME.—*Appointment Without Notice.*—*Insufficient Cause.*—*Affidavit.*—Sufficient cause within the meaning of section 1244, R. S. 1894, forbidding the appointment of a receiver without notice to the adverse party, except upon sufficient cause shown by affidavit, is not shown where it affirmatively appears that notice could easily have been given, and it does not appear, either by affidavit or by verified complaint, that irreparable or other damage would have resulted from giving the same.

From the Sullivan Circuit Court.

J. S. Bays, for appellants.

W. S. Maple and *J. Hays*, for appellee.

MCCABE, J.—This is an appeal from an interlocutory order appointing a receiver for the appellant made in vacation at chambers by the judge of the circuit court. Error is assigned upon the action of the court: (1) In appointing a receiver. (2) In appointing a receiver with-

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out notice. (3) In overruling appellant's motion to vacate the order appointing the receiver, that such appointment was contrary to law and the evidence, and is not sustained by sufficient evidence. It is contended by the appellee that these assignments do not present any question as to the propriety of the appointment of the receiver, because there is no assignment that "the complaint does not state facts sufficient to constitute a cause of action.

In *S. S. O. Iron Hall v. Baker* (20 L. R. A. 210), 134 Ind. 293, at pages 304-5, this court said: "We think there can be but little doubt as to what the true rule in this regard is. If the appointment of a receiver is but an auxiliary to a pending action, to keep intact a fund sought to be reached and applied in satisfaction of a final judgment to be rendered, or to aid in carrying out the final object of the main action, the sufficiency of the complaint will not be tested on appeal from an interlocutory order appointing a receiver, in so far as it relates to its sufficiency to entitle the party to the relief asked in the main action. In that respect, it is under the control of the trial court, and may be amended at any time before final judgment. But the court will look to the complaint, and test its sufficiency in so far as it relates to the appointment of a receiver, whether the appointment be as an auxiliary to an action, or whether the suit is being prosecuted for the sole purpose of appointing a receiver. There must be some application filed on behalf of the party seeking the appointment of a receiver and invoking the powers of the court to be exercised in that behalf. He must map out some form of pleading stating a cause for the appointment of a receiver, that the opposite party may know on what grounds the right to a receiver is claimed, and that they may know what they have to meet and defend against to prevent the appointment and the pleadings

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in this behalf will bound and limit the inquiry.” *Steele v. Aspy, Admr.*, 128 Ind. 367.

It results from the principles thus announced, that an assignment that the complaint does not state facts sufficient to constitute a cause of action in this sort of an appeal would not present any question this court could entertain, because the action is still pending in the trial court where the complaint may be amended. The appeal is not allowed in such cases for the purpose of testing any questions on the merits any farther than they or some of them may become incidentally involved in determining the correctness of the court's action in appointing or refusing to appoint a receiver. *Steele v. Aspy, supra*; *S. S. O. Iron Hall v. Baker, supra*.

On appeal from an order appointing a receiver, no questions are considered except those involved in the appointment. *Main v. Ginthert*, 92 Ind. 180.

An assignment of error upon the order of the court appointing a receiver was held good in *Main v. Ginthert, supra*.

The appointment in this case was made without notice, upon the verified complaint and oral statements of the plaintiff under oath, as the record recites.

It is contended by the appellant, that the facts stated in the verified complaint as the cause for the failure to give notice of the application are not sufficient.

The statute provides that “Receivers shall not be appointed, either in term or vacation, in any case until the adverse party shall have appeared, or shall have had reasonable notice of the application for such appointment, except upon sufficient cause shown by affidavit.” R. S. 1894, section 1244; R. S. 1881, section 1230. Other sections of the statute specify causes for appointment of receivers.

Cause for the appointment is one thing, and cause for

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appointment without notice is another and different thing. It is contended by the appellant that no cause is shown in the complaint for the appointment independent of the question of notice, and it is also contended that no cause is shown in the verified complaint for the appointment without notice.

In view of the fact that the complaint may be amended in any respect within the general scope and purpose of the action, and so far as the appointment is concerned it may be supplemented and enlarged by the presentation of affidavits or the introduction of oral testimony in support of the application and all will be taken into consideration in determining the right to and necessity for such appointment, it necessarily results that a very liberal construction must be given to the complaint. It cannot be construed by any harsh and technical rule in these respects, but it must state at least a cause for the appointment of a receiver; and, in case of any appointment without notice, it must appear either in the verified complaint or by affidavit that there was cause for such appointment without giving notice. Otherwise such an appointment is expressly forbidden by the statute quoted.

The material facts stated in the complaint, as to the right to have a receiver appointed without notice, are, that the Sullivan Electric Light and Power Company is a corporation organized under the laws of Indiana, with its principal office and place of business in the town of Sullivan, in Sullivan county, Indiana; that it was incorporated under the statutes of this State, providing for the formation of mining and manufacturing corporations, and its articles of incorporation provide that its business and prudential affairs shall be conducted by a board consisting of ten directors to be selected by the stockholders; that the capital stock of said corporation is \$15,000.00, divided into 600 shares of \$25.00 each, and

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over 300 shares and less than 400 shares thereof has been issued; that said company was incorporated in 1888; that the plaintiff is and has been the owner of 40 shares of said stock ever since June 30, 1890; that the defendants James T. Reid, Robert H. Crowder and Claude H. Crowder are also stockholders of said corporation, and this suit is brought for the use and benefit of the plaintiff and all the stockholders of said corporation not parties hereto; that the by-laws of the corporation provide that the directors shall elect one of their number president, and also elect a secretary and treasurer, and also provide further that the directors shall select an executive committee, consisting of three persons, and also provide for quarterly meetings of the directors, and that the executive committee in the interim shall have authority to act in cases of emergency, and that their acts shall be reported to the directors at the next ensuing meeting, and be subject to the approval and confirmation of the board of directors; that said by-laws further provide that the executive committee shall select a superintendent to operate and superintend the usual operation of the affairs of said corporation, the object expressed in the articles of incorporation of said company being: "The manufacture, supply and sale of electric light and power;" that about the time of the incorporation of said company a contract was procured for lighting the streets, alleys and public places of the town of Sullivan, stipulating that said company was to furnish twenty-five arc lights to the town of Sullivan, at the price of \$100.00 a year, aggregating \$2,500; that said contract expired about the month of October, 1893, which constituted the principal source of revenue for said company; that since the annual meeting of 1890 there has been no lawful meeting of the stockholders held, and no directors lawfully elected; that the executive commit-

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tee have taken no action since that of the year 1890, which has been reported to the directors for confirmation, or confirmed by them; that the executive committee, selected by the directors after the annual meeting in 1890, elected defendant, James T. Reid, superintendent for the next ensuing year; that since his election and the expiration of his term of office no superintendent has been elected, but said superintendent continued to act without authority of law, the sanction of the board of directors, or the executive committee, as provided by the by-laws, and has greatly exceeded all authority that he could have had as such superintendent, had he been properly elected, in expending large sums of money in no wise connected with the operation of said company's business; that about the time of the annual election of 1890, defendant, James T. Reid, became the owner of the majority of the stock of said company, and then formed a fraudulent design of so managing the affairs and business of said corporation, as to absorb for his own use and benefit all the emoluments and earnings of said company, and to deprive the plaintiff and other stockholders in said company of their rights to participate in the earnings and profits of said corporation, and in pursuance of said fraudulent purpose and design, from thence until the month of December, 1893, fraudulently and wrongfully managed and conducted the affairs of said corporation in an unlawful, high-handed and autocratic manner, solely for his own use and benefit, and in the manner hereinafter alleged, that is to say: The said James T. Reid, as such superintendent, issued large vouchers, payable to himself, signed the checks himself for the same, procured the money thereon to be paid to himself; that he employed himself to do various things for the company, and allowed himself exorbitant pay

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therefor, hired and employed his own teams to work for the company at exorbitant prices, approved the bills for himself and paid himself therefor, rented an office of himself and paid himself therefor; that prior to the year 1890, said company took a lease of a building and water privilege from said Reid for a term of years at \$20.00 a month, he guaranteeing an ample supply of water, stipulating to pay all damages for failure thereof; and that said supply of water did fail, so that the company was unable to run its lights for a considerable length of time, to the damage of the company, in the sum of \$500.00, which said Reid, as such superintendent, neglected and failed to collect from himself; that said lease has expired, and said company has no lease for such building and water privileges; that during the time defendant Reid has been so managing the affairs of said corporation, said company has been, since December, 1893, earning a large sum of money over and above its legitimate operating expenses which, plaintiff charges, amounts to \$10,000.00, for which sum Reid has failed to account; that said money has not been disbursed among the stockholders of said company, nor any proper or sufficient report of any kind made to the president or treasurer, secretary or directors, nor to the stockholders, showing what disposition is made of this money; that said Reid has not kept the president, stockholders or directors informed of the financial condition of the company; that he has allowed unnecessary salaries to be paid in excess of that allowed by the board of directors, without warrant or authority, the same having been paid to himself and his son, Paul S. Reid; that since the year 1890, no ledger and journal accounts have been kept of the operations of said company showing receipts and expenditures; that in the year 1893, about the time the contract to light the town

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of Sullivan expired, said town advertised for bids to light said town for a period of five years more; that said Reid failed and neglected to call a meeting of the directors or stockholders, or take any action with a view of securing the the new contract to light said town for said company, but fraudulently and in violation of the trust reposed in him, put in a bid for himself, and in his own individual name and behalf, to light said town; that by reason of such neglect and violation of duty on part of said Reid, the contract for lighting said town was awarded to, and secured by one, James H. Clugage, for a term of five years; that said Clugage executed a bond with William H. Crowder as surety, who is a brother of defendant, Robert H. Crowder, and an uncle of Claude H. Crowder; and also Fred E. Basler as sureties in the penal sum of \$5,000.00, conditioned for the faithful performance of said contract to light said town; that immediately thereafter, said Reid sold one half of his stock to defendant, Robert H. Crowder, amounting to 144 shares; that it was then and there agreed between defendant Reid and Robert H. Crowder, that they would vote their stock together, and continue to control the affairs of said corporation in the same manner that said Reid had previously been controlling the same; that said Reid made a pretended resignation as superintendent, and said defendant, Claude H. Crowder, at the instance of Robert H. Crowder was attempted to be appointed as superintendent of said company, and said defendants at the same time attempted to have themselves, to-wit: Robert H. Crowder, James T. Reid and Claude H. Crowder, appointed as an executive committee, and are so assuming to act at this time, with said Claude H. Crowder assuming to act as superintendent; that after the letting of the contract aforesaid to said Clugage, the defendants Reid, Crowder and Crowder,

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conspiring to injure the other stockholders, and without authority of the stockholders or any meeting of the board of directors, reduced the price of lights below the cost of running the same, making a reduction of 40 per cent. below former prices in order to bankrupt the competing company represented by said Clugage; that said Clugage failed to carry out his said contract with said town, by which the sureties on the bond of said Clugage, William H. Crowder and Fred E. Basler, are liable to said town in damage; that said defendants, James T. Reid and Robert H. Crowder, without authority from said corporation so to do, purchased the poles erected by said Clugage under his contract to light the town, paying, or agreeing to pay, \$1,750.00, and sold a number of poles, the property of the defendant corporation, and said defendants, Crowders and Reid, threatened to charge the purchase of said poles to the defendant corporation, the same being useless and unnecessary; that said defendants afterwards fraudulently and corruptly offered to vote their stock to carry out a contract for the sale of the said poles so bought as aforesaid, and the good will of the defendant corporation for \$800.00, charging \$2,050.00 for the good will of the defendant, and fraudulently undertook and agreed to vote their stock so that the defendant corporation should go out of business, and not be a competitor to any person who would buy said poles, and threatened to appropriate said \$2,050.00 to themselves individually; that defendants, Crowder, Crowder and Reid, have agreed to indemnify the said William H. Crowder, because of loss on the bond of Clugage; that said last named defendants are taking no steps to bid for the contract to light said town which is advertised to be let on the 12th day of July, 1894, for the unexpired term of the forfeited Clugage contract, and said defendants have conspired together not to bid, nor

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permit a bid to be made therefor on behalf of said defendant corporation; that said defendants entered into a fraudulent agreement with each other, and fraudulently undertook to induce the said William H. Crowder not to furnish money to assist said Clugage to carry out his said contract with the said town, and they promised said William H. Crowder that they would indemnify him from loss and liability on his bond aforesaid; that by reason of their undertaking to indemnify the said William H. Crowder on his bond aforesaid, and by reason of their being in control, and fraudulently and corruptly managing the affairs of the defendant corporation, it is in great danger of becoming insolvent, and is prevented from becoming a bidder to light said town; and their interest in indemnifying said William H. Crowder on his bond has wholly disqualified them from directing the affairs of said defendant corporation in its interest, and to the interest of its stockholders, refusing as they do, to take the advice or direction of the board of directors, or stockholders, not parties hereto, or of the plaintiff, to the damage of said corporation in the sum of \$1,000.00; that on account of grievances aforesaid an accounting is due from said James T. Reid to said corporation and said defendants, Reid, Crowder and Crowder are liable for damages, and a receiver should be appointed to take charge of the affairs of the defendant corporation until an accounting can be had and a judgment recovered against the said James T. Reid, Robert H. Crowder and Claude H. Crowder for the amount due from James T. Reid, and for the damages due from them and each of them severally to the said corporation; that said Crowders and Reid are neglecting to keep the property of said corporation in repair, notwithstanding its earnings were much more than sufficient so to do; that they are threatening and attempting to make deals in such a way as to

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take said corporation out of business, to the damage of the plaintiff; that an emergency exists for the immediate appointment of a receiver without notice, in this, that if said defendants, Reid and Crowders, are notified of this application before the same can be granted, will jeopardize the interests of said corporation by seeking to consummate said indemnity to said William H. Crowder on his bond aforesaid, and will afterwards by their majority of stock attempt to vote the same as an obligation upon the defendant corporation, and they will so conceal their actions as to jeopardize the rights of said corporation as to cause irreparable damage to said corporation and to produce utter insolvency of the same.

Where there is an appearance by the adverse party to an application for the appointment of a receiver, or where there has been notice of such application to such party, the complaint and affidavits may not contain or state facts enough to warrant or justify the appointment of a receiver, and yet the oral evidence adduced may have been sufficient to enlarge the cause stated on paper, so as to entitle the applicant to the appointment applied for. Not so in the case of an appointment without notice. There the statute quoted has wholesomely provided that cause for an appointment of a receiver without notice to the adverse party must be shown by affidavit. That implies that it must be in writing and filed as the cause of such appointment. Thus the adverse party may know the exact facts upon which the judge acted in appointing a receiver in his absence and wresting from him the control of his property without a hearing or an opportunity for such hearing. Without such facts being spread upon the record on appeal to a higher court from such an interlocutory order allowed by another section of the same statute, the appeal might prove to be fruitless and unavailing. So that we must look to the facts stated

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on paper, at the time the application in this case was made, exclusively to find the cause, if any there was, to justify the appointment without notice.

It was said by this court in *Pressley v. Harrison*, 102 Ind. 14 (19), speaking about the appointment of a receiver without notice, that "Unless it is shown on account of absence, or for some other cause process cannot be served on the defendant, the application should not be entertained until after service and notice." To the same effect is *Wabash R. R. Co. v. Dykeman*, 133 Ind. 56.

Here it is shown that the defendant corporation was located with its office and place of business in the town of Sullivan where the action was begun. It, therefore, appears affirmatively that giving the defendant notice was but the work of a few moments. No facts are stated in the verified complaint, even if we treat it as an affidavit required by the statute, that irreparable injury, or any other kind of damages, would have resulted to the corporation by the giving of notice of the application. We need not and do not decide whether the complaint stated facts sufficient to constitute cause for the appointment of a receiver, had there been notice of the application to, or an appearance by, the adverse party. *Wabash R. R. Co. v. Dykeman, supra.* But we do hold that no sufficient cause is shown for an appointment without notice; and that the court erred in making such appointment without notice.

The interlocutory order appointing a receiver is reversed, with directions to set aside said appointment.

Filed October 31, 1895.

 Kirby *et al.* v. Kirby.

No. 17,493.

KIRBY ET AL. v. KIRBY.

149	419
148	334
148	519
151	185
142	419
0154	379

QUIETING TITLE.—*Answer.*—*Judgment.*—*Collateral Attack.*—An answer in an action to quiet title, alleging that the judgment upon which the plaintiff's title is based was procured by fraud upon the court and minor defendants, is a direct, and not a collateral attack on such judgment.

From the Decatur Circuit Court.

J. D. Miller and *J. H. Parker*, for appellants.

W. A. Moore and *O. G. Miller*, for appellee.

HOWARD, C. J.—An abstract of the pleadings, as set out in the appellants' brief, and as admitted to be correct by appellee, shows substantially, that the action was by appellee against appellants, his minor children, to quiet title to real estate.

A guardian *ad litem* was appointed for appellants and filed an answer, and also a cross-complaint, to each of which a demurrer was sustained. This ruling is assigned as error.

The facts stated in the answer and in the cross-complaint are the same, and are briefly as follows:

That Clay M. Kirby, who was the father of appellee, and the grandfather of appellants, was during his lifetime the owner of the land in controversy, and by his last will devised the same to appellants; that after the death of said testator and the probate of his will, the appellee and the other children of the decedent wrongfully conspired and confederated together to deprive the appellants of said land, and to distribute the same among themselves; that, in pursuance of such conspiracy, they.

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caused to be filed in the court below, against the appellee and the appellants, and also the executor of the will, a complaint by the remaining children of the said Clay M. Kirby, to contest and set aside his said will, alleging that the same was unduly executed, and that it was procured by the undue influence of the appellee over the said testator; that on the call of said cause the executor of said will and the guardian *ad litem* for appellants each filed an answer in general denial, while the appellee suffered default, whereupon the cause was submitted to the court for trial, and judgment was entered setting aside the will; that said judgment and decree were wrongful, and were procured by fraudulent devices and artifices, whereby the court was imposed upon and deceived, and the meritorious defense which appellants had, but which, because of their extreme youth, they were prevented from presenting to the court, was concealed and hidden; that neither the executor nor the guardian *ad litem* made any preparation for an actual defense to said action; that no witnesses were subpoenaed for appellants; that although the attorney who drew the will and also one of the attesting witnesses were in court at the time of the trial, and the other attesting witness was near at hand, all of whom, if called, would have given evidence of the due execution of the will, and that the same was not procured by undue influence, yet none of said witnesses were called to give any evidence; that the only witness examined was one of the plaintiffs, whose competency was doubtful, and who had not been present at the writing or execution of the will, and did not testify to any fact or circumstance occurring at the time of such execution, and was not cross-examined; that no evidence of any kind was introduced for the appellants, nor was any argument made to the court in their behalf; that no

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exception was taken to the finding or judgment, nor any motion made for a new trial; that soon after the rendition of the decree, all said land, by deeds from the children and heirs of said testator, was conveyed to appellee, and the suit to quiet title was brought to enable him to sell the same; that all indebtedness of said testator has been paid and said executor discharged. Appellants are of the ages of four and six years, respectively.

We are of opinion that the allegations thus made of fraud upon the minors in the procurement of the decree setting aside their grandfather's will in their favor, should have been submitted to the court for trial upon the evidence. It seems clear either that a fraud was practiced upon the court, or that the court was itself derelict in its duty. The rights of infants are peculiarly within the custody of courts, and the responsibility so placed by the law should not be lightly regarded. Too often, also, guardians *ad litem* look upon their duties to the minors, for whom they answer, as a mere formality.

If the decree complained of was wrongful, as alleged, and this wrong was due to the fault of the court or its officers, it may be that the wrong is irreparable, being secured by the judgment from collateral attack. If, however, as alleged in the cross-complaint, and as admitted by the demurrer, the court was imposed upon by appellee and the other children of Clay M. Kirby, and its decree thus procured by fraud upon the minor defendants, the attack here made would be direct, and not collateral, and should prevail. *Nealis, Admr., v. Dicks*, 72 Ind. 374; *Earle v. Earle*, 91 Ind. 27; *Brown v. Grove*, 116 Ind. 84; *Brake v. Payne*, 137 Ind. 479; 2 Pom. Eq. Juris., section 919; Bigelow Fraud, 172; see also *Grimes v. Grimes* (Ill.), 32 N. E. Rep. 847;

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Kelsal v. Kelsal, 2 Myl. and K. 409; *Richmond v. Tayleur*, 1 P. W. 737; *Crain v. Parker, Admr.*, 1 Ind. 374; *Richards v. Richards*, 17 Ind. 636

The judgment is reversed, with instructions to overrule the demurrer to the answer and to the cross-complaint, and for further proceedings.

Filed October 31, 1895.

 No. 17,709.

JORDAN v. THE STATE.

CRIMINAL LAW.—Arson.—Indictment.—Description of Property.—An averment in an indictment for arson, describing the property burned as a certain mill-house “of” persons named, sufficiently describes the property as a building and as belonging to the persons named, under section 2000, R. S. 1894, providing that whoever willfully and maliciously burns any dwelling-house or other building being the property of another, is guilty of arson.

WITNESS.—Injured Person.—Arson.—Part Owner of Building.—A part owner of the building burned is a party injured by the offense of arson, within the meaning of sections 1865–1867, R. S. 1894, providing that a person injured by the offense committed shall be a competent witness.

SAME.—Husband and Wife.—Arson.—Party Injured.—A husband or wife may testify in criminal prosecutions against the other, when he or she is “the party injured by the offense committed,” whether the evidence involves communications between them or not, under the civil code, providing that the husband and wife shall be incompetent to testify as to communications made to each other, and sections 1865–1867, R. S. 1894, providing that the rules governing the competency of witnesses in civil cases shall govern in criminal cases except as otherwise provided, and that a party injured by the offense committed shall be a competent witness.

From the Knox Circuit Court.

H. Burns and J. S. Pritchett, for appellant.

142	499
147	133

142	422
150	593

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W. A. Ketcham, Attorney-General, *J. T. Goodman*, Prosecuting Attorney, *W. A. Cullop* and *C. B. Kes-singer*, for State.

HACKNEY, J.—By indictment the appellant was charged with having “unlawfully, feloniously, willfully and maliciously set fire to and burned a certain flouring, grist and corn mill-house of Samuel A. Jordan, Aaron G. Jordan and Winfield S. Lane,” etc. A motion to quash the indictment was overruled and, upon a trial by jury, the appellant was found guilty as charged. The only assigned errors of the trial court are in overruling the motion to quash the indictment and in overruling a motion for a new trial. It is contended that the indictment was insufficient in failing to charge the burning of a *building* and in failing to charge that such building was the *property* of another. The statute defining the crime of arson provides that “Whoever willfully and maliciously burns, or attempts to burn, any dwelling house or other building * * * being the property of another * * * is guilty of arson.” “Mill-house” has no meaning not implying a building. By the ordinary use of the word “house” it is understood to mean a building, and when taken in connection with the words “flouring,” “grist,” “mill,” etc., it is capable of but one meaning. This has been very clearly decided in a case similar to the present, see *Ford v. State*, 112 Ind. 373.

The charge that it was the “mill-house of Samuel A. Jordan,” etc., sufficiently charged that such mill-house was the property of those named. This exact question was decided against the views of the appellant in *Wolf v. State*, 53 Ind. 30.

The two objections to the indictment thus stated could not have been passed upon in any other manner in view

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of the statutory provisions that "The words used in an indictment * * must be construed, in their usual acceptation, in common language," (R. S. 1894, section 1805,) and that an indictment * * is sufficient if "the offense charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case." (R. S. 1894, section 1824.)

The next question, arising upon the motion for a new trial, is the alleged error of the court in permitting Aaron G. Jordan, the husband of the appellant, to testify as a witness on behalf of the appellee that, prior to the burning of the mill, the appellant had declared to him her intention to burn the mill, and that after its destruction she had told him that she did burn it. The objections made at the trial and repeated in this court are that such communications from the wife to the husband are privileged, and that he was, therefore, an incompetent witness as to such communications.

By the civil code (R. S. 1894, sections 504, 505), all persons, except those specifically exempted, are made competent witnesses in civil actions. Of those specifically declared incompetent are "Husband and wife, as to communications made to each other." By the criminal procedure act, R. S. 1894, sections 1865-1867, it is provided that "The rules of evidence prescribed in civil cases and concerning the competency of witnesses shall govern in criminal cases, except as otherwise provided in this act." It is further provided that "The following persons shall be competent witnesses : * * *

* * * *Second.* The party injured by the offense committed." There can be little doubt, we think, that the effect of these various provisions is that, with reference to criminal procedure, the "Husband and wife, as to communications made to each other," are incompe-

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tent witnesses except that if either is "The party injured by the offense committed" he or she is a competent witness. Such was the holding of this court in *Doolittle v. State*, 93 Ind. 272. Appellant's learned counsel concede that this is the effect of these provisions, but they seek to limit the application of the phrase, "The party injured by the offense committed," so far as it includes husband and wife, to such injuries as result from the personal violence of either upon the other. This insistence is upon the theory that at common law the wife was competent to testify against her husband and the husband against the wife only in cases involving the personal safety or liberty of either; that the rule of the common law should be so sacredly upheld, in the interest of the marriage relation, that a legislative intention to abridge that rule must be clearly and explicitly stated before the courts will give it recognition. This intention, it is urged, is not apparent from the statutory provisions above quoted. This position was denied as early as the case of *Hutchason v. State*, 67 Ind. 449, where the wife was permitted to testify to the acts of the husband in the commission of the arson there charged. It was held that "The legislative intent is so apparent, and the language of the statute so explicit, that no room exists for construction or doubt," and that such intent was to make the wife competent as to everything excepting "communications."

In *Doolittle v. State*, *supra*, it was expressly held that the phrase "The party injured by the offense committed," together with the context, created an exception to the rule of incompetency as to "communications." So we find that the adjudged meaning of our statutes is to admit either the husband or the wife to testify in criminal prosecutions against the other when he or she is "the party injured by the offense com-

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mitted," whether the evidence involves communications or acts which are part of the *res gestæ*.

It is further claimed by appellant's counsel that the husband was not "the party injured by the offense committed," since the offense was in destroying property, and that, too, in which he was but an owner in common with others. To this proposition is cited *Bassett v. United States*, 137 U. S. 496, a case where the husband was prosecuted for bigamy, and it was held that, under the statute of Utah, the wife could not testify to the husband's confessions of guilt, made to her, for the reason that, while the offense was one of disloyalty to the marital relation, and a deep humiliation to the wife, it was, nevertheless, but a crime against the relation, and not against the wife. There the statute, considered as excluding husband and wife as witnesses, contained an exception as "to criminal action, or proceeding, for a crime committed by one against the other." This provision, however, was in the civil code, and, as will be observed, was negative in form. There the criminal code contained the following provision: "Witnesses, competent in civil actions, are competent also in criminal proceedings, "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding, to which one or both are parties." Utah, 2 R. S. 1888, p. 743. It will thus be seen that the negative exception of the civil code was construed as granting no right to the wife to testify in a criminal prosecution against her husband, when the criminal code expressly excluded her as such witness. So far, therefore, from constituting an authority in favor of appellant's contention, we think it has no bearing upon the question. Our statute very

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plainly makes the husband or wife a competent witness where he or she is "the party injured by the offense committed." The word "injured," as employed, must be construed in its plain, ordinary and usual sense. R. S. 1894, section 240. It is not to be limited to personal or physical injuries, but, in its plain, ordinary and usual sense, it signifies: the privation of a legal right; a wrong; a tort. Anderson Dictionary of Law: "Injury means, in general, any wrong or damage done to a man's person, rights, reputation or goods." 11 Am. & Eng. Ency. of Law, p. 1, note 1. In *People v. Howard*, 17 Cal. 64, one of the statutes in review provided that "the party or parties injured shall, in all cases, be competent witnesses," and the court, speaking by Mr. Justice Field, said: "By 'injured party' is meant the person who is the immediate and direct sufferer from the offense committed." The husband was an injured party, and to hold that his competency must turn upon, and be defeated by, the fact that others were likewise injured by the arson, would be unduly technical and narrow.

Objection is further made that the evidence did not support the verdict. In this, we think, counsel are in error. There was evidence reasonably supporting the verdict in every material element of the charge.

Finding no error in the judgment of the circuit court, the same is affirmed.

Filed October 31, 1895.

No. 16,920.

THE PENNSYLVANIA CO. v. THE STATE.

CONSTITUTIONAL LAW.—Railroad.—Blackboard Law.—Time of Arrival of Train, etc.—The discrimination against travelers from railway stations at which there are no telegraph offices, in sections 5186–5187, R. S. 1894, requiring railroads to place in each passenger depot at any station where there is a telegraphic office a blackboard, and to note thereon whether schedule trains are on time, and if late how much, does not conflict with Ind. Const., article 1, section 23, forbidding the granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens, or with the provision of the federal constitution, that no State shall deny to any person within its jurisdiction the equal protection of the law.

STATUTE.—General.—Legislative Discretion.—Whether a general law could be made applicable within the meaning of Ind. Const., article 4, section 23, providing that “In all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State,” is, as to any case not specially enumerated, a legislative and not a judicial question.

SAME.—Blackboard Statute.—Local or Special.—Penalty.—Judgment.—Prosecuting Attorney.—The act of March 9, 1889 (sections 5186–5187, R. S. 1894), is not a local or special law within the Ind. Const., article 4, section 22, forbidding local or special laws for the punishment of crimes and misdemeanors, as requiring a special form of judgment, or a judgment in favor of the prosecuting attorney, although a portion of the penalty recoverable by the State is to be paid to the prosecuting officer.

SAME.—Uniform Operation.—General.—A law which operates in all parts of the State in a similar manner where the same circumstances and conditions exist, is a law of uniform operation within Ind. Const., article 4, section 23, providing that in all cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

APPELLATE PROCEDURE.—Review of Former Decision.—Constitutional Question.—Statute.—A former decision by the Supreme Court upon the constitutionality of a law will not be reviewed by the same court in another action, although the personnel of the bench has changed in the meantime, and some other court might, if the question were originally presented to them, incline to a different view from that formerly held.

142	428
142	699
142	428
147	190

142	428
149	295
149	300
151	145
151	155

142	428
155	460
156	516
156	535

142	428
157	237

142	428
158	437

142	428
161	257
161	843

142	428
165	618

142	428
168	274

The Pennsylvania Co. v. The State.

STATUTE OF LIMITATIONS.—*When Will Not Run Against the State.*—

Penalty.—The two years' limitation under section 294, R. S. 1894, against actions for the recovery of a statutory penalty, does not apply to an action for such a penalty in favor of the State, as section 805 provides that limitations of actions shall not bar the State except as to sureties.

DEFENSE.—*Action by State to Recover Penalty.*—*Constitutional Law.*

—The violation of Ind. Const., article 8, sections 2, 3, providing that fines assessed for breaches of the penal laws of the State and all forfeitures which may accrue, shall constitute a part of the common-school fund, by the provision of a penal statute, is not available in defense of an action by the State for the recovery of the penalty prescribed by such statute.

RAILROAD.—*Blackboard Statute.*—*Time for Necessary Provisions for Observance of Requirements.*—Railroad companies were not entitled to any time after the proclamation of the act of March 9, 1889, which took effect sixty days after its approval, to make the necessary provision for the observance of its requirements as to noting upon blackboards to be maintained at stations whether schedule trains are on time, and, if late, how much, as it is provided that compliance shall begin "immediately after taking effect of the act."

From the Scott Circuit Court.

S. Stansifer, B. K. Elliott and W. F. Elliott, for appellant.

W. A. Ketcham, Attorney-General, for State.

HACKNEY, J.—This was an action by the appellee for the recovery of penalties for the violation of the act of March 9, 1889, R. S. 1894, sections 5186, 5187; Elliott Supp., sections 1088, 1089. The complaint was in seventy-three paragraphs, and each charged a distinct violation of said act, in the failure of the appellant to note, upon a blackboard, at least twenty minutes before the schedule time of the arrival of passenger trains, the fact as to whether such trains were on schedule time, and if late, how much. The paragraphs apply to different trains, and different days, including trains stopping at Scottsburg, from May 10, 1889, to May 19, 1889. The

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complaint was filed on the 9th day of May, 1891, and summons was issued thereon, June 4, 1891. Demurrers were overruled to the several paragraphs of complaint, and the appellant answered in five paragraphs to the four affirmative paragraphs, to which demurrers were sustained. Upon a trial there was a finding and judgment in favor of the appellee for \$1,400.00. Questions of the constitutionality of said act bring the appeal within the jurisdiction of this court.

The second paragraph of answer alleged that on May 10, 1889, when the act took effect, the appellant was operating 220 miles of railway, having fifty passenger stations, with depots and telegraph offices, and that when the statute took effect, the appellant, "exercising due care and reasonable expedition, proceeded to and did prepare blackboards, three feet long and two feet wide, and placed one in a conspicuous place in each of said passenger stations, including the one mentioned in the complaint, all of which was done by May 18, 1889, and it is averred that the work could not have been done within a shorter period of time." The third paragraph pleaded substantially the same facts with the conclusion, "that it reasonably and conveniently required, to-wit: seven days within which to prepare and place said blackboards as aforesaid."

The fourth paragraph alleged the placing of blackboards in the depots mentioned in the complaint by May 18, 1889; that summons did not issue until June 11, 1891, and that the action was commenced more than two years after each of the causes of action sued on had accrued.

The fifth paragraph was substantially the same as the fourth.

As will be observed, the second and third paragraphs proceeded upon the theory that after the law was dis-

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tributed and had, by the proclamation of the governor, gone into effect, the companies affected by it would have a reasonable time in which to prepare and place black-boards upon which to note the time of arrival of trains, and that such reasonable time, as alleged in the third paragraph, was seven days. In discussing the sufficiency of the complaint, the proposition is also pressed that companies were entitled to a reasonable time, after the law was declared in force, within which to prepare for compliance with its requirements.

The language of the act, as to the time when compliance shall begin is: "Immediately after [the] taking effect of this act." If there had been an emergency clause, under which penalties would, by the letter of the law, have attached at once upon its passage, manifestly, it would have worked great hardship to hold that the Legislature meant to inflict heavy penalties for failing to do that which necessarily required time for preparation to do. Probably, the situation thus stated would have required the holding that the word "immediately" was not employed to exclude the intervention of a reasonable time within which to prepare and place the boards required. So we may say, with reference to the time when the law went into force, May 10, 1889, if that were the first notice that railway companies were required to take of the law. As we find it, the law was approved March 9, 1889, and was proclaimed in force May 10, 1889, more than sixty days, and, upon the allegations of the answers, an abundant time within which to prepare for compliance with the law, and for the avoidance of the prescribed penalties.

The law, having passed without an emergency clause, was not in force until May 10, 1889; however, its passage by the Legislature, and the declaration of the constitution, that it should be in force from its distribu-

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tion, and the proclamation of the governor, was notice to railway companies sufficient to enable them to prepare for its requirements, we have no doubt. It is one of the frequently declared objects of section 4, article 19, of the State constitution, requiring that the subject of an act "shall be expressed in the title," "to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Cooley Const. Lim. (6 ed.), p. 171; *Henderson, Aud., v. London, etc., Ins. Co.*, 135 Ind. 23 (20 L. R. A. 827).

There was the same emergency for the existence of the law between March 9th, and May 10th, 1889, as that following those periods, and the omission of an emergency clause was, probably, to enable companies to prepare to comply with the law when it should be declared that penalties were enforceable. It is not claimed that the Legislature possessed no power to enact that penalties should attach at once upon the passage of the law, or upon the declaration that it had been published. The contention, as we understand it, is that the Legislature will not be deemed to have intended so harsh a measure. The question being one of intention and not of power, and the word "immediately" ordinarily signifying "without interval of time," we must conclude that the Legislature omitted the emergency clause, and provided that compliance should follow "immediately after (the) taking effect of" the act, thereby intended to give to railway companies the period extending from the passage of the act to the proclamation of the governor, in which to prepare for compliance without penalties. Aside from the question of legislative intent to give such opportunity, and also of the constructive or implied

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notice of the passage of the act, and presuming that power existed to enforce penalties “without interval of time” for preparation, it then becomes a question of legislative judgment not reviewable by the courts, and a question of the good faith of railway companies in possibly possessing actual knowledge of the law, but delaying beyond the period for its enforcement without steps to meet its requirements, a question not made by the answers and not subject to review.

The sufficiency of the fourth and fifth answer depends upon sections 294 and 305, R. S. 1894 (sections 293 and 304, R. S. 1881). The first provides that “For * * * a forfeiture or penalty given by statute,” actions shall be commenced within two years after the cause of action has accrued. The appellant, standing upon this provision, insists that the penalties sued for accrued before May 19, 1889; that while the complaint was filed on the 9th day of May, 1891, summons was not issued and the suit not commenced, in contemplation of law, until, as the answer alleges, the 11th day of June, 1891. To this proposition is cited section 316, R. S. 1894, (section 314, R. S. 1881), which provides that “A civil action shall be commenced by filing in the office of the clerk a complaint and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons.” In view of section 305, *supra*, we need make no decision of the force of the appellant’s position thus stated, since that section provides that “Limitations of actions shall not bar the State of Indiana, except as to sureties.” Very plainly, we think, the limitation insisted upon by the appellant does not apply where the cause of action, as in this case, is in favor of the State of Indiana.

Invoking the rule of a strict construction for penal statutes, appellant’s learned counsel, with much ability,

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attack the act in question as void for ambiguity. The first duty of the courts, in the construction of statutes, is to ascertain the intention of the Legislature in the enactments, whether such statutes fall within the rule calling for a strict or that calling for a liberal interpretation. All of the alleged ambiguities of the act in question must be tested in the light of the legislative intention, ascertained from within the lines of the act. There is no guide to the ascertainment of legislative intention by which, in every case, the interpreters may be led, with unerring certainty, to the one conclusion, yet it is the manifest policy of the law that interpretation of a given act shall not be so varying and unstable as to yield; like the kaleidoscope, a new view as each new hand turns the instrument. While the act is not drawn with the care and skill that its importance to the public and to railway management should have required, we feel that its meaning having been considered and determined by our predecessors, a bench justly distinguished for its learning and ability, we cannot review that decision, upon the very questions then made, though, if a question of first impression, some of us might incline to a different view. See *State v. Indiana, etc., R. R. Co.*, 133 Ind. 69 (18 L. R. A. 502); *State v. Pennsylvania Co.*, 133 Ind. 700.

All that we have said with relation to the interpretation of the act, against the objection that it is ambiguous, may be said concerning the renewed objection, that cumulative penalties are not permitted, but that the recovery is limited to one "for each violation of the provisions of the act in failing to report, or in making a false report," and that only when a blackboard shall have been "placed in the depot 'upon which' to write the fact," etc.

It is here insisted, as it was in the cases above cited,

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that the act in question violates sections 2 and 3 of Art. 8 of the constitution, which sections provide that “the fines assessed for breaches of the penal laws of the State, and * all forfeitures which may accrue,” shall constitute parts of the common school fund, and provide further that the principal of such fund “shall remain a perpetual fund,” and “shall never be diminished.” This proposition is directed to the penal provision of section 2 of the act which provides, “That for each violation of * * this act * * the company shall forfeit and pay the sum of twenty-five dollars, to be recovered in a civil action to be prosecuted by the prosecuting attorney * * * in the name of the State of Indiana, one-half of which shall go to said prosecuting attorney and the remainder to be paid over to the county in which such proceedings are had, and shall be part of the common school fund.” The objection urged against the act, in this respect, is that the recovery, treated as a fine or as a forfeiture, was made, by the constitution, a part of the common school fund and could not be diverted therefrom or diminished by appropriating it to the payment or benefits of public officers. In addition to what was said of this proposition in the former cases, we express our conclusion that the appellant may not avail itself of this objection. The recovery, so far as offenders are concerned, is fixed, not to be recovered by the prosecuting attorney, but by the State of Indiana. If, as insisted, the provision that “one-half * * shall go to said prosecuting attorney” should violate the constitution that conclusion would not excuse the appellant from paying the penalty and would certainly not render invalid that provision which creates the penalty and subjects the appellant to its payment. If the provision that one-half of the penalty shall go to the prosecuting attorney were unconstitutional, that would be a question properly

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arising between the State for the benefit of the common school fund, and such prosecuting attorney.

It is here further urged that the act infringes that provision of the federal constitution which reserves to Congress the power to regulate interstate commerce. This question was, in our opinion, fully and correctly settled against the appellant's position in the cases of *State v. Indiana, etc., R. R. Co., supra*, and *State v. Pennsylvania Co., supra*.

It is insisted that the act violates the second subdivision of section 22, Art. 4, of the State constitution, which forbids the enactment of local or special laws "For the punishment of crimes and misdemeanors." The argument of counsel proceeds upon such a broad construction of the word "misdemeanors" as would include all violations of duty for which penalties may be provided, though such penalties may be recoverable in civil actions, and as not limited to offenses punishable by criminal procedure and whose penalties are imposed as fines or by imprisonment in the county jail. While there may be instances in which this word should be given the meaning here insisted upon we doubt that such was the meaning in which it was employed in the constitution. However this may be, the question yet remains to be determined, is the act local or special? Counsel claim that it is special in "Regulating the practice in courts of justice," as forbidden by subdivision 3, section 22, Art. 4, of the constitution.

They say: "Considered as affecting the form and substance of the judgment, the act is special: (1) Because it provides for special judgments in favor of particular persons and against particular persons. (2) Because it provides a special statutory action and authorizes a particular judgment in favor of a particular officer against particular persons. (3) Because it gives a particular

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officer a part of a penalty and thereby requires a judgment in favor of such officer." These propositions grow out of a strained construction of the act, and, in our opinion, cannot be maintained.

The act does not require a special form of judgment. There is nothing in the act, directing or suggesting that the form of judgment shall be other than that governed by the general practice act. The proceeding and judgment are, so far as the provisions of the act are concerned, subject to the direction of the code. It is true that the action is by, and in the name of, the State. This provision cannot be condemned as special; indeed, we do not understand counsel to so claim. Nor, can it be true that the judgment is required to be entered in favor of the State of Indiana and of the prosecuting attorney, jointly or in severalty. The provision that one-half of the recovery shall go to the prosecuting attorney, was intended as a method of compensating that officer, and to encourage the active enforcement of the law against its violators, and was not intended to require the prosecutor to become a party litigant, either as affecting the pleadings or the judgment. That the prosecutor is given a share in the results of the litigation, no more requires that the judgment shall be entered in his favor, than that an attorney's privilege to maintain a lien for his services, requires that the judgment in his client's favor shall be so entered as to include his claim for fees.

The constitutional validity of the act is further questioned as not being in compliance with the fourteenth subdivision of section 22, Art. 4, of the State constitution, which, together with the context, provides that the General Assembly shall not pass local or special laws "In relation to fees or salaries, except that the laws may be so made as to grade the compensation of officers

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in proportion to the population and the necessary services required." As may be observed, this proposition involves the theory that the prosecuting attorney participates in the recovery, and that the appellant, aside from its interest in common with that of the people of the State, has an interest in the distribution of the fund recovered as penalties for violations of the act.

This theory, as we have already shown, is not tenable, so far as this case is concerned, and can have place only in a case involving the right of the prosecuting attorney to enforce his claim to one-half of the judgment. It is suggested by counsel that the act violates section 23, Art. 1, of the constitution, which forbids the granting "to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." This suggestion has its force in the idea that persons, traveling from railway stations at which there are no telegraph offices, are entitled to the same information as to the arrival of trains, as those traveling from stations having telegraphic facilities. So manifestly does the act in question permit all classes to avail themselves of the benefits intended by it, that we can hardly believe this suggestion to have been seriously made. Within the borders of the State there is no citizen, or class of citizens, given a privilege or immunity, by this act, which, "upon the same terms, shall not equally belong to all citizens." This provision of the constitution, if applied as appellant suggests, would forbid the enactment of a law, permitting the construction of a railway, passing through cities and avoiding towns, or passing through some cities and avoiding others. This law does not grant a privilege, nor extend immunity. It simply requires that railway management shall observe a given rule, intended for the benefit of every one who may avail himself of it.

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What we have said of this suggestion applies with like force to the appellant's further suggestion that, under section 1, Art. 14, of the Federal constitution, no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The only remaining question presented by counsel is that this act is local and special, and therefore lacks uniformity of operation, as forbidden by sections 22, 23, Art. 4, of the State constitution.

This question proceeds upon the two propositions that there is a railway, operated within this State, which has no station telegraphic facilities but which employs, instead, a system of telephones, and that the act does not purport to apply to all common carriers, but omits the company referred to and omits all carriers by water. It is said that this question was not passed upon in the cases of *State v. Indiana, etc., R. R. Co., supra*, and *State v. Pennsylvania Co., supra*, but, in this, we think counsel are in error as will be seen from pp. 77, 78, 133 Ind. It is urged, however, that if there decided, it was not correctly decided, and we are again asked to consider the question.

Section 22, *supra*, enumerates particular instances in which local or special laws shall not be enacted, and we have seen that the present law does not fall within any of those particular inhibitions. Section 23, *supra*, provides that "in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." Under this provision it was the duty of the General Assembly to have enacted a law of "general and uniform operation throughout the State," if a general law could be made applicable. Whether a general law could be made applicable, in any instance not so specially enumerated, is not a judicial question, but has many times been held

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to be a legislative question. *Young v. Board, etc.*, 137 Ind. 323; *Bell v. Maish*, 137 Ind. 226; *State, ex rel., v. Kolsem*, 130 Ind. 434 (14 L. R. A. 566); *Wiley v. Corp. of Bluffton*, 111 Ind. 152; *Gentile v. State*, 29 Ind. 409. If, in our opinion, there were strong reasons for pronouncing this act special or local in its application to the classes of railways, it will be seen that, under the rule of the cases cited, we could not pass upon the question. It is our opinion that the law in question operates in all parts of the State in a similar manner where the same circumstances and conditions exist. This, it has frequently been held, answers the requirement that laws shall be of uniform operation. *Young v. Board, etc., supra*; *Consumers' Gas, etc., Co. v. Harless*, 131 Ind. 446 (15 L. R. A. 505); *Groesch v. State*, 42 Ind. 547; *State v. Indiana, etc., R. R. Co., supra*; *State v. Pennsylvania Co., supra*.

We conclude, therefore, that the record presents no available error and the judgment of the circuit court is affirmed.

Filed November 1, 1895.

No. 17,588.

WEAVER ET AL. v. KENNEDY.

BILL OF EXCEPTIONS.—*Omitted Evidence.*—*Appellate Procedure.*—

A bill of exceptions purporting to contain all the evidence will not be considered if it shows upon its face that some of the evidence is omitted.

From the Clay Circuit Court.

J. A. McNutt, for appellants.

142	440
147	512
142	440
148	110
151	581
152	318

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G. A. Knight, for appellee.

MONKS, J.—This proceeding was brought by appellants, under section 396, R. S. 1881, section 399, R. S. 1894, to set aside a default and decree taken by appellee against appellants. The court below after hearing the evidence denied the application, and over a motion for a new trial rendered a judgment for costs against appellants.

The only error assigned is the overruling of appellants' motion for a new trial. The motion for a new trial assigned two reasons: 1, that the decision of the court is not sustained by sufficient evidence, and 2, that the decision is contrary to law.

The error assigned requires a consideration of the evidence. Appellee insists that this court cannot consider the evidence for the reason that it affirmatively appears from the bill of exceptions that it does not contain all the evidence, citing *Ward v. Bateman*, 34 Ind. 110; *Miles v. Buchanan*, 36 Ind. 490; *Morrow v. State*, 48 Ind. 432; *Powers v. Evans*, 72 Ind. 23; *Johnson v. Wiley*, 74 Ind. 233; *Shimer v. Butler University*, 87 Ind. 218; *Clay v. Clark*, 76 Ind. 161; *Collins v. Collins*, 100 Ind. 266; *Thames Loan and Trust Co. v. Beville*, 100 Ind. 309; *Jennings, Guar., v. Durham*, 101 Ind. 391; *French, Admr., v. State, ex rel.*, 81 Ind. 151; *Fellenzer v. Van Valzah*, 95 Ind. 128; *Seymour Woollen, etc., Co. v. Brodhecker*, 130 Ind. 389, p. 391.

It is settled by the authorities cited by appellee that if a bill of exceptions purports to contain all the evidence, yet if it shows upon its face that it does not, this court will not consider the sufficiency of the evidence to sustain the verdict of the jury or finding of the court.

The affidavit of appellee was read in evidence but was not copied into the bill of exceptions, and in the place

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where it should have been copied are the words “(here insert.)”

It follows, therefore, that this court cannot consider the error assigned, as the same depends for its proper determination upon the evidence.

Judgment affirmed.

Filed November 1, 1895.

No. 17,463.

STUMPH ET AL. v. MILLER.

HARMLESS ERROR.—Evidence.—The admission of improper evidence which only tends to prove a fact otherwise clearly shown by competent evidence, is harmless error.

EVIDENCE.—Nonexpert.—Opinion.—Physical and Mental Condition of Another.—A nonexpert witness may state his opinion as to the mental condition of another, in connection with a statement of the facts upon which it is based, if such facts show that he is acquainted with the person, has had opportunity to observe him, and has observed him.

SAME.—Mental Condition of Grantor Preceding Date of Execution of Deed.—The mental condition of the grantor a few months preceding the date of the execution of a deed may be shown under an allegation of mental incapacity to execute the same, due to extreme age and to sickness extending back of the time to which the evidence relates.

SPECIAL FINDING.—Time of Making Request.—When Discretionary.—It is discretionary with the court whether it will make a special finding of the facts, where the request therefor is not made until substantially all the evidence has been heard, under section 546, 560, R. S. 1894. (sections 537, 551, R. S. 1881.)

From the Marion Superior Court.

J. E. Franklin and *G. W. Woods*, for appellants.

J. M. Bailey, for appellee.

HOWARD, C. J.—The appellee alleges in her complaint

143	442
144	140
142	442
161	286
142	442
166	30
142	442
170	289

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that the appellant Carrie V. Stumph is her daughter, and the appellant Henry Stumph her son-in-law; that at the times of the transactions herein complained of, the appellee was extremely aged, being nearly eighty years old; that she is very illiterate, and for the three years previous to the filing of her complaint, covering also the time of the acts herein alleged, she was sick and afflicted, causing mental and physical weakness, which greatly enfeebled her will power, and weakened her judgment, and rendered her incapable of transacting business; that, by reason of her enfeebled mind, and of her age and sickness, she was incapable of exercising her own judgment, and could easily be persuaded by the use of improper influences, and promises, and threats, to do things greatly to her disadvantage; that the appellants, well knowing the said condition of appellee, and knowing the influence which they had over her, by reason of their said relationship to her, did, for the purpose of cheating and defrauding her out of the real estate here in controversy, unduly influence, intimidate, threaten, coerce, and make false promises to her, by all of which they procured her to make a deed for said real estate to the appellant Carrie V. Stumph; that no consideration whatever was given for said deed, but a consideration of \$1,000.00 was inserted in the deed, whereas the real estate is of the value of \$2,000.00.

In a second paragraph of complaint appellee sets out the same facts as in the first paragraph, and states, in addition, that up to June, 1892, she was living on her said lot in the city of Indianapolis with another daughter and her husband, Charles Rose, under a contract with said Rose, when, by the persuasion of the appellants, she was induced to leave her place and go to live with appellants; that a short time after she went to live with them, appellants began their importunities, threats and

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solicitations, to induce her to deed to them her property, threatening to drive her from their home, if she did not do so; that the appellant Carrie V. Stumph at times, would come to the appellee in tears, and seemingly in great anguish, and plead and beg and persuade her to deed the property; that, so persuaded, threatened and coerced, she did, in August, 1892, make the deed without consideration; that after the deed was so made, the appellants treated appellee in a cruel and inhuman manner, confined her in a room, refused her sufficient food and water, when she pleaded in tears for the same, compelled her to remain undressed day and night, and took her dress out of her room, so that she could not leave the house; that, after bearing this treatment as long as she could, she stole out of the house in her night clothes, at eleven o'clock in the night, and walked for hours upon the streets, until some person, unknown to her, returned her to the home of her other son-in-law, Charles Rose. Other acts of cruelty, fraud, and deception in the procurement of the deed are alleged, and the court is asked to set aside the deed and appoint a commissioner to re-convey the property to appellee.

There was an answer in general denial, and the cause was submitted to the court. On hearing the evidence, there was a finding for the appellee.

The only assignment of error, discussed by counsel, is the overruling of a motion for a new trial.

The complaint alleges that the appellee's mental and physical health was greatly impaired for three years before the bringing of the suit, which was for over two years previous to the date of making the deed. As bearing on the question of her health, Dr. W. H. Haines, a witness for the appellee, was asked whether he saw her in the winter or spring of 1892. This was objected to, for the reason that enquiry as to appellee's mental

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condition should be confined to about the date of the deed, August 1, 1892.

We can see no impropriety in the question as put. It was alleged that her mental and physical condition, when the deed was made, was due to extreme age and to sickness. The sickness, as alleged, extended far back of the winter and spring of 1892, and it was pertinent to enquire into her condition throughout the period, during which her alleged debilitated condition was coming on, so that the court might better understand her condition at the time of the transaction complained of. Imbecility, due to age and ill health, is brought on by causes and conditions, which may extend back for some time previous to the actual weakness of mind, resulting from such causes.

In any event, the admission of the evidence was harmless, inasmuch as the evidence, so admitted, but tended to show the enfeebled condition of appellee, in body and mind, which condition was abundantly proved by other evidence, given without objection by the same witness, and also by evidence, given by Dr. Butterfield, a witness introduced by appellants themselves. The admission of improper evidence, which only tends to prove a fact otherwise clearly shown by competent evidence, is harmless error. *Board, etc., v. Hammond*, 83 Ind. 453; *Holliday v. Thomas*, 90 Ind. 398; *Citizens' State Bank v. Adams*, 91 Ind. 280.

Moreover, if appellee was feeble-minded in the spring of 1892, it would be presumed, in the absence of evidence to the contrary, that this condition continued until the first of August thereafter, when the deed was made. In matters of evidence, as said in *Adams, Ass'nee, v. State*, 87 Ind. 573: "It is a fundamental doctrine, that when a fact is once shown to exist, the presumption is that it continues to exist, and this presumption stands good

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till the contrary is shown or a countervailing presumption is raised. Taylor Ev., section 155; 1 Greenl. Ev., section 41; Whart. Ev., section 1284; Burrill Cir. Ev., 528."

It is objected that two of the witnesses, John Furnas and Samuel Friesner, were permitted to give to the court their opinions as to the mental condition of the appellee. The facts upon which the opinions of the witnesses were based, were also given. It has frequently been held that when a witness gives the facts upon which he bases his opinion, as to the condition of the mind or body of a person, the opinion itself may also be given, provided the facts show that he is acquainted with the person, has had opportunity to observe, and has observed him. It may be that the witness is unable to place before the court all the facts upon which he bases his opinion, but if he shows acquaintance with the person, and opportunity for observation, and that he has observed, that will be sufficient upon which to base an opinion. *Colee v. State*, 75 Ind. 511; *Johnson, Admr., v. Culver, Admx.*, 116 Ind. 278; *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138.

Counsel next complain of the refusal of the court to make a special finding of the facts, when requested by appellants. This request was made eleven days after the trial began, after the evidence had been substantially all heard, and just before the argument. We think the request came too late. The court should have had an opportunity to take notes of the evidence, so as to make an impartial and accurate finding. By listening attentively to all the evidence, the court may be enabled to make a correct general finding; but to make a special finding of the facts, it is necessary to note carefully the evidence, as it is given. This the statute pro-

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vides for, section 546, R. S. 1894 (section 537, R. S. 1881); section 560, R. S. 1894 (section 551, R. S. 1881).

In *Hartlep v. Cole*, 120 Ind. 247, it was said: "We are of the opinion that if the request for a special finding is not made at the commencement of the trial, the right thereto is waived, and thereafter it becomes a question within the sound discretion of the court, whether it will make a special finding or not." See, also, *Miller v. Lively*, 1 Ind. App. 6.

While, therefore, by the aid of the stenographer's notes, or otherwise, the court may make a special finding of the facts, when requested, at any time before the entry of judgment (*Thompson v. Connecticut, etc., Co.*, 139 Ind. 325), yet the reasoning in the case of *Hartlep v. Cole*, *supra*, makes it clear that it must remain discretionary with the court, whether such finding shall be made in case the request does not come before the introduction of the evidence.

It is finally argued that the judgment is not supported by the evidence. Not only do we think there is sufficient evidence to sustain the judgment, but we think the evidence abundantly shows a case of unusual wrongdoing and oppression against this helpless and partially demented woman, on the part of her daughter and the daughter's husband. The case is, in many respects, like that of *Ashmead v. Reynolds*, 134 Ind. 139 (39 Am. St. Rep. 238), and is, we think, ruled by that case and the authorities there cited.

The judgment is affirmed.

Filed November 5, 1895.

Perrine v. Barnard *et al.*

No. 17,504.

PERRINE v. BARNARD ET AL.

SALE.—For Cash.—Personal Property.—Constructive Delivery.—Seller's Lien.—Resale by Purchaser.—A seller for cash of lumber which remains in his lumber yard is not deprived of his lien for the purchase price as against a purchaser from the buyer, by setting it apart in such manner as to constitute a constructive delivery sufficient to vest title in the buyer.

SAME.—Subpurchaser.—Notice.—Lien of First Vendor.—Possession.—A subpurchaser who knows that lumber purchased by his seller is in the yard and apparently in the possession of the original seller is bound to take notice that the latter is claiming a lien thereon for unpaid purchase money.

From the Henry Circuit Court.

T. E. Ellison, for appellant.

M. E. Forkner and *W. O. Barnard*, for appellees.

JORDAN, J.—Appellees, Cyrus Barnard and Ambrose Barnard, partners doing business under the firm name of “C. Barnard & Son,” instituted this action for the recovery of money and to enforce a seller's lien upon certain described lumber, which, as they alleged, was in their possession. In the first paragraph of their complaint they state substantially, that in May, 1893, they owned and operated a saw-mill and lumber yard in the town of Greensboro, Henry county, Indiana; that they had, upon their yard, a large amount of oak and other lumber; that prior to May, 1893, at divers times, they sold to one Herbert V. Root, three hundred thousand feet of lumber, which, as it was agreed upon between the parties, should be paid for by Root when it was taken possession of by him; that such had at all times been the course and custom between them of

Perrine v. Barnard *et al.*

dealing in their said business; that this lumber was measured and placed on sticks in plaintiffs' yard and left in their possession; that Root during his life, paid the purchase price of said lumber, except \$315.00, which is unpaid; that plaintiffs have at all times been in possession of the lumber and still hold the same as a security for the unpaid balance of the money; that Root has sold and assigned the lumber to the defendant, Perrine, and they demand judgment for the enforcement or foreclosure of their alleged lien.

The second paragraph sets up, that they agreed to sell Root the lumber in question; that it was measured and placed upon sticks in their yard and left in their possession as a pledge and security for the purchase price and that they still hold and have the possession thereof; that Root sold and assigned the lumber to Perrine subject to their lien, and the death of the former is alleged and they ask for a foreclosure of the lien.

The third paragraph avers, that they sold to Root at divers times over six thousand dollars worth of lumber, as shown by a bill of particulars filed; that it was the uniform dealing and understanding between them and the former that he should, at his pleasure, measure and separate the several kinds of lumber and place the same on sticks in their yard and leave it there in their possession until he had paid for the same; that on May 20, 1893, in pursuance of said course of dealing, they sold to Root a specified number of feet of lumber, and also on August 1, 1893, they, in like manner, sold him a certain number of feet as therein mentioned. It is averred, that the lumber was measured and piled upon sticks and left in their yard in their possession until paid for, and that all of said lumber known as Cooper oak remains in their possession; that on the — day of August, 1893, there was due to the plaintiffs upon the

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lumber sold, \$315, and it was therefore agreed between the plaintiffs and Root that this Cooper oak lumber shall remain in their possession and be held by them until the full payment of the purchase money, and that the same yet remains in their possession and has not been delivered; that Perrine purchased the lumber from Root, who is now dead. Prayer for the enforcement of their lien, etc.

There was an answer in denial and also setting up affirmative facts in avoidance of plaintiffs' cause of action. A trial resulted in the court rendering a judgment in favor of appellees, foreclosing their lien.

The principal question presented for our consideration by appellant's learned counsel, and, in fact, the only one argued by him, is that the finding and judgment of the trial court is contrary to law and is not sustained by the evidence.

We have read and examined the evidence and find that it tends to establish substantially the following facts: That appellees, at and prior to the commencement of this action, were engaged in operating a saw-mill and lumber yard in Henry county, Indiana, as alleged in their complaint; that Root and appellant resided in Fort Wayne, Indiana, both of whom were engaged in the business of buying and selling lumber. For several years prior to this action, he (Root) had been in the habit of buying lumber of appellees. When he purchased lumber from them it would be measured out and they would place it on sticks in their mill yard, where it remained in their possession until they, under an agreement with Root, would haul it to the railroad and place it in the cars to be shipped to points directed by him. The hauling of the lumber to the railroad by appellees was at their own expense, but they were paid two dollars per car extra by Root for placing the lum-

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ber in the car. At the beginning of the dealings between these parties, he paid cash for all lumber purchased by him. Subsequently, at times, he would give his note to appellees with the agreement that they should discount it, and he would stand the discount in order to make it the same to appellees as a cash payment. There is also evidence showing that in February, 1893, appellant gave Root an order for one hundred and eighty thousand feet of Cooper oak lumber, to purchase the same anywhere he could, and when it was turned over to appellant, the latter was to pay for it, and that the lumber in question appears, or is claimed by appellant to be a part of that purchased by Root from appellees. Some few days prior to August 3, 1893, appellees were in need of money. Root came to see them and informed them that he could not raise the money and did not know when he could, but further said: "There is enough lumber here," meaning that purchased by him, "to make you safe, but if you people are not satisfied I can send you ten thousand dollars security." The \$315.00, the amount in suit was not embraced in any note or anything of that character, and was unpaid. Root died some time prior to the beginning of this action leaving the balance of the purchase price, in suit, unpaid. Appellant frequently bought lumber of Root, in this manner, he would give the latter an order for a bill of lumber and Root was privileged to purchase the same from whomever he pleased. Appellant would advance money to him and there was a running account between them, and when he purchased lumber of the latter he would give him credit upon his account. At the time of the conversation between Root and the appellees about the lumber being enough to secure them, they had no knowledge that any of it had been sold by Root to appellant. Before appellant purchased the

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lumber in question he visited the lumber yard of appellees and saw the situation there, and at the time he purchased the same as stated by him, he knew it was in the yard of appellees on sticks. Appellees did not know that appellant was claiming to have purchased the lumber from Root until after the latter's death, etc.

There is evidence to some extent tending to controvert the facts above stated, but the weight to be given to the evidence in the cause was a matter resting with the trial judge. Considering the material facts given above, as established, the question arising is, do they, under the law, sustain the judgment of the lower court? The chief contentions of appellant's counsel are: 1. That the lumber in question was actually delivered to Root when sold. 2. That the lumber was sold by appellees to Root on credit, and that, in either event, under the law, no lien existed in favor of appellees. In order to reach a proper determination of the questions herein involved, it is necessary to examine some of the principles of law pertaining to liens of the character of the one under consideration. A seller of goods has a lien upon them for the purchase money unpaid so long as they remain in his possession, and this lien exists only when the property in the goods has passed to the buyer, as no man can have a lien upon his own goods. As the seller's right of lien depends upon actual or constructive possession, he cannot maintain it, generally speaking, after the property sold has come into the possession of the purchaser. The authorities sustain the proposition that there may be such a constructive delivery of the goods or chattels as will suffice to pass the title, but will not destroy the lien. If the property sold be counted out and set apart for the purchaser, there is such a constructive delivery of the same as to vest the title thereto in the purchaser, and the property will be at his risk, but

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the seller will retain the right to refuse to deliver it without payment, provided the sale was not upon credit. In support of these several principles as above stated, see Jones Liens, Vol. 1 (2 ed.), sections 800, 806 and 807; Story Sales, sections 281, 282, 282a and 283; Lawson Rights and Remedies, section 3106, p. 5061; Am. and Eng. Ency. of Law, Vol. 21, pp. 601 to 611, inclusive; *Southwestern, etc., Press Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Holderman v. Manier*, 104 Ind. 118; *Walls v. Long*, 2 Ind. App. 202, and cases there cited.

The lien, if it once exists, will continue in favor of the seller as against a sub-purchaser, if the former has in no way assented to or induced the re-sale of the property, so as to be estopped by the application of the rule that where one of two innocent persons must suffer by the act of the third, he who has enabled such third person to occasion the loss must bear it himself. See sections 841, 846 and 847, Jones Liens, *supra*.

Applying the principles above stated to the evidence in the case at bar, and the conclusion follows that the judgment below must be upheld as being sustained thereby in accordance with the law.

It appears from the summary of the evidence which we have set out, that when appellees sold lumber to Root, it would be measured and set apart upon sticks in their mill yard, and there it remained until they would haul it to the railroad station, and place it upon the cars for shipment, and the labor of hauling the lumber to the cars, and putting the same aboard, as it appears under the arrangement between the parties, devolved upon them, and not upon Root; he paying them two dollars extra per car, not for hauling to the station, but for placing it in the car ready for shipment. The sales

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seem to have been made for cash, or that which was to appellees equivalent thereto. It is stated in evidence by appellees that the price of the lumber involved in this suit was not embraced in any notes given by Root. This apparently eliminates the question of credit from the case. The fact that the lumber was in the possession of the appellees, seems to have been recognized by Root, when he said to them in the conversation to which we have referred, that "There is enough lumber here to make you people safe."

The lumber in question was, at the time of the commencement of this action, still in piles upon sticks in in appellees' mill yard, with the amount of the purchase price involved unpaid.

We therefore think and so hold, that, under the facts, appellees had such possession of the lumber as to entitle them to their lien as against Root. The question then arises, did it exist at the time they instituted this action as against the appellant, who claims to be a sub-purchaser from Root for value paid? From the authorities of law herein cited, it appears that where the seller has not assented to, or induced the re-sale of the property, his lien is not destroyed, and such sub-purchaser takes it subject thereto.

It appears, as we have seen, that appellant was a wholesale dealer in lumber, and had what is termed a running deal or account with Root. That he would advance money to the former, and then when he would give him an order for lumber and receive the same, he would give Root credit for it upon his account.

Up to the death of the latter, appellant had advanced him on a general account, some four thousand dollars and over, and as security for the same he held an insurance policy for four thousand dollars on Root's life, and at his death he (Root) was owing appellant a balance on account

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of money advanced him on lumber transactions, the sum of about \$5,300.00. The appellant was not able to fully state upon his examination on the trial, as to how he paid Root for the lumber in controversy—whether by cash or by giving him a credit upon the account which he was owing him. Shortly before appellant gave Root an order for the purchase of lumber, as we have seen, he visited the mill yard of appellees, and saw the situation of the lumber, and when he purchased it from Root he admits that he knew it was on sticks in the appellees' yards. It does not appear that appellees had any knowledge of the sale of the lumber to appellant, or induced him to buy the same. The first knowledge that they seem to have of appellant's claim to it was after the death of Root. Appellant states that he purchased of Root one hundred and eighty thousand feet of lumber. In other words, he gave an order for him to fill to that amount, and Root had the privilege to purchase from appellees or from other parties. In fact, it does not clearly and specifically appear what lumber appellant did purchase of Root, or that he had title to the particular lumber herein involved.

The fact that appellant visited the yard of appellees before he purchased the lumber, and saw the situation of the same, and knew it was in their yard upon sticks, and at least apparently in their possession, we think was sufficient to put him upon inquiry, and had he made inquiry of them, we must presume that he would have ascertained that they had possession of the property, and were claiming a lien thereon for unpaid purchase money. Where one has received knowledge of such facts as should put him on inquiry, the law enjoins upon him the duty to do so with diligence and in good faith.

In any view of the case as it is disclosed by the evi-

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dence, we think that it is manifest that appellees retained their lien, and the trial court was warranted in rendering judgment in their favor.

Judgment affirmed.

Filed November 5, 1895.

No. 17,571.

THE WINDFALL MANUFACTURING CO. v. EMERY ET AL.

TOWN. — *Annexation of Territory. — Sufficiency of Reasons Not Reviewable on Appeal. — County Commissioners.* — The sufficiency of the reasons stated in a petition for the annexation of territory to a town cannot be considered upon appeal, at least in the absence of a plain abuse of the discretion necessarily vested in the county board of commissioners, by the omission of the statute to prescribe what reasons shall be set forth.

SAME. — *Annexation of Territory. — Evidence. — Remonstrant. — Use of Streets. — School Children in Such Territory.* — In a proceeding under statutes for the annexation of territory to a town, it may be shown that the office of the remonstrant is within the town, that the streets of the town are used in the transportation of the products manufactured by him within the territory in question that other factories in the same territory are in prospect and that children residing in such territory attend the schools in the town.

From the Hamilton Circuit Court.

Blacklidge & Shirley and Shirts & Kilbourne, for appellant.

W. O. Dean and W. H. Dean, for appellees.

MONKS, J — This was a proceeding for the annexation of certain territory to the town of Windfall, brought before the board of commissioners of Tipton county. Appellant appeared before the board and filed a remonstrance. A trial was had which resulted in a finding and judg-

142	456
142	517

142	456
150	572

142	456
153	526

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ment that said territory be annexed. Appellant appealed to the circuit court, the venue was changed to the Hamilton Circuit Court, where the cause was tried by a jury, a verdict returned against appellant and over a motion for a new trial, judgment was again rendered that said territory be annexed.

The only error assigned is the overruling of appellant's motion for a new trial.

One of the causes assigned for a new trial questions the sufficiency of the evidence to sustain the verdict. It has been held by this court that as the statute does not prescribe what reasons for annexation shall be set forth in the petition, that question is necessarily left to the sound discretion of the authority passing on the same. *Catterlin v. City of Frankfort*, 87 Ind. 45; *Elston v. Board of Trustees*, 20 Ind. 272; *Chandler v. City of Kokomo*, 137 Ind. 295.

The sufficiency of such reasons being within the sound discretion of the authority to which they are addressed, this court cannot review that discretion unless, possibly, it has been plainly abused. *Chandler v. City of Kokomo*, *supra*. The reasons set forth in the petition for annexation in this case have not been questioned in this court by an assignment of error.

It is urged, however, by appellant, that, in considering the evidence, we should disregard certain of the reasons for annexation stated in the petition, because they are insufficient.

If we could review the exercise of discretion as to the sufficiency of the reasons stated for annexation when it had been palpably abused—a question we do not determine—we would be compelled to adjudge that there was no such abuse in this case. On the contrary, the sufficiency of the reasons stated is sustained by this court.

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Catterlin v. City of Frankfort, supra; Stilz v. City of Indianapolis, 55 Ind. 515.

The objection urged by appellant to the reasons stated for annexation could only be reached by a motion to make more specific. This being true, there is evidence which supports the verdict, and, under the well settled rule, we cannot weigh the evidence.

The court below permitted a witness on behalf of appellee, to testify over the objection of appellant, that "he was appellant's bookkeeper from March, 1891, until the 1st of June, 1892, and that during that time he kept its books at a store in the town of Windfall; that the books of appellant were at the tile factory on the 1st of April, 1893; that appellant used the streets of the town for hauling and getting a large portion of their brick; that Gifford, a member of the appellant company, was engaged in the agricultural implement business in the corporate limits of the town; that the town of Windfall bought and used over \$750.00 worth of brick and tile made by appellant; that there was a company organized for the purpose of building a canning factory on the territory to be annexed; a part of the material is bought and on the ground, and they are at work at it now."

J. H. Zaner, a witness for appellees, was allowed, over appellant's objection, to testify as to the number of children who attended the schools in the town, where they resided, and the number residing in the town, the number residing in the territory sought to be annexed, and elsewhere.

It is assigned as a cause for a new trial that the court erred in admitting this evidence.

It was proper, under the issues in this case, to give evidence concerning the location of appellant's factory with reference to the corporate limits of the town, its size and capacity; where its office was kept, whether in

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town or at the factory ; whether the town was a market for any part of its product, and to what extent, if any, the appellant and its customers used the streets of the town in the delivery of its products and the transaction of its business. The number of hotels, banks, elevators, mills, the different kinds and amount of business carried on in the town or in the territory sought to be annexed ; the number and kind, capacity and location of manufacturing establishments, whether in operation or in process of construction ; the number of children, who attend the schools, the number who reside in town and the number who reside in the territory to be annexed or elsewhere. Any evidence was proper which tended to show the location of the town, its improvement, advantages and surroundings, its institutions, its advantage as a trading point, its railroad and gravel road facilities, the various kind of industries and business carried on in the town and territory to be annexed, the business relations between the owners of the land in the territory to be annexed and the mutual benefits between the appellant and the town, and many other matters not necessary to mention.

The testimony to which objection is made was given while the witnesses were testifying in regard to matters which the jury had the right to consider. The extent to which parties in the examination of witnesses may go into the details of each subject under investigation, is largely in the discretion of the trial court, and we do not think such discretion was abused in this case.

It follows that there was no error in admitting the evidence to which objection was made.

Judgment affirmed.

Filed November 5, 1895.

Kerlin v. Reynolds et al.

No. 17,070.

KERLIN v. REYNOLDS ET AL.

FEES AND SALARIES.—*Salary of Township Trustee, for Overseeing the Poor, Payable from County Treasury.*—The salary of a township trustee, acting as overseer of the poor, is payable from the county treasury, and is not a charge against the township fund, as the acts of 1879, p. 142, directing payment for such services out of the county treasury, was not repealed by the acts of March 6, 1889, March 7, 1891, and March 4, 1893, providing that each trustee shall receive a specified sum per day in full compensation for all services performed by him in any capacity.

STATUTE REPEALED.—*Dog Law.—Taxes.*—The act approved March 5, 1891, creating a method for the taxation of dogs to the exclusion of all other methods, was repealed by the act of March 6, 1891, sections 47 and 53 of which provided another and antagonistic method of taxation.

TOWNSHIP TRUSTEE.—*Office Expense, Fuel, Light, etc.—Liability For.*—The expenses of office rent, fuel and light, incurred by a township trustee, are not a charge upon the township fund, as the statutes grant no authority to incur such expenses.

SAME.—*Attorney's Fees.—Expenses for Blank and Records.—Liability For.—Township Embracing City.*—Expenses incurred by the trustee of a township embracing a city, for attorney's fees and for purchasing blanks and records, are not a charge upon the township fund, as there are no united purposes of the urban and suburban populations requiring such expenditures.

SAME.—*Services in Relation to Township Library Furnished by State.—Liability For.*—The services performed by a township trustee in connection with the library furnished by the State to the township is in his capacity as school trustee, under the statutes, which contemplate the establishment of a library system as a part of the educational or common-school system of the State, and are not a charge against the township.

From the Carroll Circuit Court.

J. H. Gould, G. R. Eldridge, G. W. Julien and W. C. Smith, for appellant.

M. A. Ryan, E. B. Sellar and W. E. Uhl, for appellees.

142	460
143	572
142	673
142	460
145	242
147	236

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HACKNEY, J.—The appellant, for himself and on behalf of the citizens and taxpayers of the city of Delphi, sued to enjoin the collection, as taxes for township purposes and to the use of Deer Creek township, the sum of seven cents on each one hundred dollars in value of the real and personal property within said city and owned by the appellant and such other taxpayers of said city.

Two questions are presented by the record and discussed by counsel; the first challenging the authority of the township, for township purposes, to levy a tax upon the property within the limits of and subject to taxation by an incorporated city, and the second denying the sufficiency of the record of the county commissioners to disclose a concurrence by the board in such levy. Our conclusion renders it unnecessary to consider the manner of making the levy since we have no doubt of the absence of any authority to make a levy for such purposes upon such property.

The question does not depend upon the constitutional authority of the Legislature to subject the property of the minor political subdivision to taxation for the purposes of the major division, for the reason that the Legislature has not, so far as we have been able to learn, attempted by any existing legislation to exercise any such authority.

The township trustee is an officer chosen by the people whom he serves, and these comprehend not alone the people of the township outside the incorporated cities and towns, but also the citizens within such cities and towns. Outside the cities, his duties relate to the schools and the roads. Even these duties are so performed that when relating to the schools he acts as the school trustee, and when relating to the highways and to some other township affairs he is deemed to act for the civil township,

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and is the civil township trustee, commonly known as the township trustee. In the performance of any such duties he does not serve the people of the cities, and owes them no obligation for the manner in which he performs such duties. With relation to the highways and the schools within the city, they are subject alone to official control of officers of such city, and are created, supported and maintained alone by the citizens of the city through a system of taxation provided by the Legislature for enforcement by and through the official agencies of the city. In these respects, and possibly in some others, the city corporation and that of the school or civil townships are entirely separate and distinct, though the city is within the geographical limits of the civil township.

There is no authority given to tax the people of a township, outside the city, for the support of interests within and relating alone to the city in its distinct corporate capacity, and it may, in like manner, be said that those interests which are peculiar to the citizens and the property outside such city must find support alone from those whose interests they are, namely, those of the township as distinguished from those of the city. In the absence of affirmative legislation commingling such interests, dividing such burdens and providing that a common officer shall protect and enforce them, we must hold that they are to be deemed separate and treated distinctly. This conclusion necessarily follows from the nature of our forms of local government. This conclusion does not, however, exclude the idea that there may be interests general and mutual as between the citizens and the property within the cities and within the civil township. In the support and care of the poor within the civil township, including those within the cities, there are such interests, and there could certainly

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be no legal objection to a method of taxation bearing alike upon the citizens and property of the whole township, including such cities. For such purposes, and in view of such general and mutual interests, such citizens and such property would constitute a taxing district. Therefore, "the nature of the tax will determine the district," as said by Judge Cooley in his work on Taxation, p. 153.

The laws of this State have made the support of the poor a county system in the matter of levying and collecting the taxes for that purpose, and in the one respect of constituting the township trustee an overseer of the poor is such system a township system. The cities and towns, under our general laws, maintain no separate methods of caring for the poor, but for that purpose the trustee is the agent and officer for them in common with the citizens of the township outside of the cities. In this respect, at least, is the trustee the officer of the citizens of both the city and the township, outside of the city, and in this is found an answer to the argument that if not a representative of the city population, that population should and could have no voice in his election.

If we are correct in the conclusion that the urban and suburban population and property of a township may properly be the subjects of a common tax, and that such citizens are entitled to act in common in the election of an officer to perform a public duty in which both are interested alike, then it remains to inquire whether a tax for township purposes creates a fund in the expenditure of which there is any common or mutual interest or duty. The appellant earnestly maintains that there is no such interest, while the appellee's learned counsel insist that the trustee renders services which inure to the benefit of the inhabitants of the city; and that

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townships may maintain public cemeteries and keep them in repair for use by all of the inhabitants of the township for the burial of their dead. No service is specially mentioned and none occurs to us, saving that rendered as overseer of the poor, and for that he is paid from the county treasury. R. S. 1881, section 6009. The act of February 29, 1893 (Acts 1893, p. 158), is the only permission to township trustees to maintain cemeteries, that has come to our notice. The levy in question was made in June, 1892, and could not have been made in view of or by the authority of that act. We are not inclined to the view that the act would permit the trustee to maintain a cemetery for the use of residents of the incorporated city, but this we need not here decide.

It is not claimed by the appellee that the levy can be justified for the purpose of compensating the trustee for services as an inspector of a township election, and since no such election has been held since April, 1890, and by the act of March 2, 1893 (Acts 1893, p. 192), such elections will hereafter be held as a part of the general elections, no such claim could reasonably be made.

Section 5995, R. S. 1881, directs a levy, for township purposes, upon the property of the township. In the same connection it is directed that such levy shall be made for road and other purposes. We have no doubt, in the absence of a common interest between the two municipal corporations, the city and the township, this statute should be construed to apply to the property of the township as distinguished from that within the limits of the independent municipality, the city. The appellees' learned counsel cite the case of *Tilford, Aud., v. Douglass, Tr.*, 41 Ind. 580, as contrary to this view. That case involved the question of

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the power to levy a tax, for township purposes, upon property within an incorporated town, and it was held that, as overseer of the poor, the trustee's salary was payable from the fund raised by such levy, and that he had to do with the streets, alleys and highways of the town, the taxes for which were levied by him. The power was there upheld upon the theory of mutual interests, urban and suburban, in the objects and purposes for which the levy was made. Whether such interests existed at the time, and as between town and township municipalities, is not a question with which we are now concerned, and it is sufficient to say that neither of such interests so held to be maintained in common are now maintained in common by the people of the city and of the township.

By the act of March 6, 1889 (Elliott Supp., sections 1977 and 1978), the act of March 7, 1891 (Acts 1891, p. 349), and the act of March 4, 1893 (Acts 1893, p. 298), the salaries of township trustees in townships containing populations of from 25,000 to 100,000 were specially provided, and by the first two of said acts the rate of compensation of all township trustees, other than those whose townships contained such special populations, was provided.

By none of these acts is the question before us affected. If injustice may be done by the special acts mentioned, in the townships where such special salaries are provided, that is not a reason for departing from what we believe to be the true rule in the case before us. The responsibility for that injustice, if any, must rest with the Legislature, and is not for consideration by this court.

We conclude, therefore, that the levy in question was without authority of law, so far as it included property

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within the city of Delphi; and that the ruling of the circuit court was erroneous.

The judgment of the circuit court is reversed, with instructions to grant the appellant's motion for a new trial.

Filed March 9, 1894.

ON PETITION FOR REHEARING.

HACKNEY, J.—The appellee has presented an extended, earnest and able petition for a rehearing. With one or two exceptions the questions argued are those passed upon in the original opinion. It is insisted that we are in error in holding that the services of a trustee as overseer of the poor are compensated from the county treasury and not from the township fund. It is claimed that the acts of March, 6, 1889, March 7, 1891, and March 4, 1893, *supra*, repeal section 32 of the act of March 31, 1879 (Acts 1879, p. 142), which provided that “The *per diem* of township trustees shall be as follows, to-wit: For each actual day's service they shall be allowed, be paid out of the township fund, \$2.00: *Provided*, That for all services as overseer of the poor, said township trustees shall be paid out of any funds in the county treasury not otherwise appropriated, on the order of the board of county commissioners.” The alleged repealing statutes each contained the provision “That each trustee of any township in this State shall receive for the time he is necessarily engaged in the discharge of his duties, the sum of two dollars per day, and this shall be full compensation for all services that they shall in any capacity and in any manner perform.” By the same sections, salaries are provided for trustees in townships having populations from seventy-five thousand to one hundred thousand. Laws in conflict with these

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provisions are expressly repealed, but there is no provision expressly or by implication repealing the former provision, that made by the acts of 1879, *supra*, for the payment of such *per diem* from the township fund, and as overseer of the poor from the county treasury. As we said in the original opinion, the poor system is distinctly a county system in the manner and source of its support, and this is verified by reference to the statute, R. S. 1894, section 8142 to section 8190. By section 8145 the support of the poor is expressly charged upon the counties and the boards of commissioners are directed to raise the moneys for that purpose. This obligation extends to the transient as well as the permanent or resident poor. Settlements by the overseer are made with the county commissioners and the moneys expended by him are drawn on the orders of the board from the county treasury. Sections 8160, 8163, 8164, R. S. 1894. This theory of the law was clearly outlined both as to services performed and as to compensation in the cases of *Board, etc., v. Bromley*, 108 Ind. 158, and *Board, etc., v. Fischer*, 86 Ind. 139. To take the charge of compensation to the overseer from the county and to place it against the township breaks the uniformity of the system as a county charge without any reason for so doing. There being no reason for so doing, and the language of the act not enforcing an intention to do so, we cannot presume that the Legislature desired or intended to repeal the provision of the act of 1879, that compensation as overseer should be paid from the county treasury.

The law does not favor the repeal of statutes by implication, but requires clearly repugnant language to effect such repeal. *Hunt v. Lake Shore, etc., R. W. Co.*, 112 Ind. 69; *Chamberlain v. City of Evansville*, 77 Ind. 542; *Water Works Co. v. Burkhart*, 41 Ind.

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364; *Blain v. Bailey*, 25 Ind. 165; *Spencer v. State*, 5 Ind. 41.

We conclude, therefore, that the salary of the trustee, acting as overseer of the poor, is payable from the county treasurer, and that it is not a charge against the township fund.

It is further insisted that the office expenses of the trustee, such as blanks, records, lights, fuel, office rent and attorney's fees constitute an expenditure in which the urban and the suburban population of a township are interested in common, and that they constitute a charge against the township fund. Counsel have not advised us as to the authority under which a trustee may incur these various items of expense and charge them to the township fund. We know of no statutory provision authorizing the expense of office, fuel and lights, and conclude, therefore, that no authority exists. *Board, etc., v. Axtell*, 96 Ind. 384; *State, ex rel., v. Mills*, 142 Ind. 569.

If blanks and records are required they are chargeable to the fund in whose interest they are required to be kept, and are not a charge against the united urban and suburban population unless required for the united purposes of such populations, and these we hold do not exist. As to attorney's fees, if the employment is authorized at all, and is on behalf of the roads, it would be a charge to the road fund, and if on behalf of the schools, a charge against the school fund, etc. But without some joint interest existing between such populations, there could be no joint liability and no necessity for a joint fund. If, however, any or all of such expenditures are proper, they are such as to enable the trustee to assign them to the particular interest requiring them. Their existence does not prove that both populations must bear them jointly. It is suggested,

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also, that a service performed for the people of the cities and those of the country is that of making a registry of dogs as required by the acts of 1891, page 453. That act was approved March 5, 1891, and, by its first, sixth, and eighth sections, created a method for the taxation of dogs to the exclusion of all other methods of taxation for such animals.

On the 6th day of March, 1891, a later act was approved (Acts 1891, p. 199), sections 47 and 53 of which provided another and antagonistic method of taxation for such animals. The latter act repealed the former by necessary implication, and the services of the trustee contemplated by the former acts, are not required to be performed.

It is further contended that the trustee is required to perform for such two populations, in common, the service of controlling the township library, and to this proposition are cited sections 4527 to 4533, R. S. 1881; 6018, *et seq.*, R. S. 1894.

These sections are from the general school law of March 6, 1865, Acts 1865, p. 1. By section 132 of the act, the libraries are denominated "township school libraries." They were purchased, not by the townships, but by the State, and were distributed to the townships on the basis of school population. The trustees are required "at the commencement of each school term, at each school house in their respective townships, to cause a notice to be posted up, stating where the library is kept, and inviting the free use of the books thereof by the persons of their respective townships," etc. Every implication from the provisions of the act is, that the Legislature intended the library system to constitute a part of the educational or common school system of the State, and that the service to be performed by the trustee, in connection therewith, is in his capacity as school

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trustee. This conclusion is aided by the provisions, in other laws: 6013, 6014, 6015, 6016, 6017, R. S. 1894; Acts 1891, p. 35, for the establishment, maintenance, and control of city and town libraries on behalf of such corporations independently of the civil or school townships. Very clearly, we think, the attention, if any, which a trustee may devote to the township school libraries is not a service for, or in which the population of a city within the civil township is interested, or may be taxed to support. The thirty years which have elapsed since such libraries were established, and during which no funds have been provided for their renewals, and additions have, in most instances probably, made such libraries institutions of the past, and have rendered the provisions of the act of 1865, as to trustee's care, a dead letter. In any event, the service required is on behalf of his school township, and if no compensation is provided from the school revenues, a question upon which we venture no opinion, that fact should be no reason for taxing populations not within the school township, to raise funds to pay such compensation. Again, counsel discuss what they claim to be an injustice to the suburban populations, to require their property to bear the entire burden of taxation for a township fund. It is upon the theory that the benefits derived from the sources to which such fund is expended accrue to such populations exclusively, that such burden is required to be so borne. If those not benefited shared the burdens the injustice would result to them.

To insist that, as to the gathering of the township fund, the urban population, though not sharing in the benefits should share its burdens, supplies equally the the argument for contending that the suburban population should aid in supporting the schools, and the streets and alleys of the cities. Such a contention, how-

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ever, would make the injustice of such a rule manifest to the members of the suburban population. After a second full investigation of the question, we are convinced that we were not in error in our original conclusions. The petition for a rehearing is overruled.

Filed November 5, 1895.

 No. 17,497.

RUSS v. RUSS ET AL.

APPELLATE PROCEDURE.—Motion to Modify Judgment, Ruling, Exception.—When Not Properly in Record.—A motion to modify a judgment, the ruling thereon, and the exception thereto are not properly brought into the record on appeal under section 662, R. S. 1894, providing that papers relating to collateral matters may be made part of the record by order of the court; by an entry upon the transcript immediately following a purported copy of the motion: “And the court, having heard said motion, overrules the same, to which ruling the defendant at the time excepts, and the same is now ordered to be made a part of the record”—as it is not clear whether it was the motion, the ruling thereon, or the exception, or all of them, that was attempted to be included.

From the St. Joseph Circuit Court.

A. L. Brick and J. W. Talbot, for appellant.

Anderson and Du Shane, for appellees.

MCCABE, J.—The appellees sued the appellant in the St. Joseph Circuit Court, to enjoin him from wrongfully using a trade-mark and trade names belonging to the appellees by purchase from the former firm of S. A. Russ Co., known as S. A. Russ’ Bleaching Blue, and to recover damages for such wrongful use. The issues

149	471
147	832
142	471
150	561
142	471
158	800
158	478
158	630

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joined were tried by the court, resulting in a general finding, judgment for \$300.00 and a perpetual injunction pursuant to the prayer of the complaint over appellant's motion for a new trial and to modify the decree of injunction. Error is assigned on the action of the court in overruling the motion for a new trial, in overruling the motion to modify and in rendering judgment against the appellant.

The only one of these alleged errors discussed in the brief of appellant's counsel, is that overruling the appellant's motion to modify the decree. The other assignments are therefore deemed waived.

The motion to modify was not made a part of the record by a bill of exceptions, but an attempt was made to make it a part of the record by an order of court. Collateral motions, together with the action of the court thereon and exception thereto, must be made a part of the record by bill of exceptions or special order of court. *Greensburg, etc., Turnp. Co. v. Sidener*, 40 Ind. 424; *Scotten v. Divilbiss*, 60 Ind. 37; *Boil v. Simms*, 60 Ind. 162; *School Town v. Gebhart*, 61 Ind. 187; *Myers v. Conway*, 62 Ind. 474; *Merritt v. Cobb*, 17 Ind. 314; *Board, etc., v. Montgomery*, 109 Ind. 69. Where the record does not otherwise show the decision or the grounds of objection thereto, the matter should be brought into the record by bill of exceptions or order of court. *Reddinbo v. Fretz*, 99 Ind. 458; *State v. Cooper*, 103 Ind. 75. Unless a motion to dismiss an appeal from a board of county commissioners is incorporated in a bill of exceptions, no question of the trial court's ruling thereon is presented on appeal to this court. *McCoy v. Able*, 131 Ind. 417. A motion to make a complaint more specific, it has been held, is not a part of the record unless brought into such record by a bill of exceptions. *Line v. State, ex rel.*, 131 Ind.

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468. To like effect are : *Thiebaud v. Tait*, 138 Ind. 238, and Elliott App. Proced., sections 190, 191, 192. Objections to the form of the decree or judgment such as that urged here, must be taken in the trial court by motion to modify, or they are unavailable. *Hormann v. Hartmets*, 128 Ind. 353 ; *Ludlow v. Walker*, 67 Ind. 353 ; *Merritt v. Pearson*, 76 Ind. 44 ; *Scotton v. Mann*, 89 Ind. 404 ; *Stout v. Curry*, 110 Ind. 514 ; *Benefiel v. Aughe*, 93 Ind. 401 ; *City of Greenfield v. State, ex rel.*, 113 Ind. 597 ; *Buchanan v. Berkshire, etc., Ins. Co.*, 96 Ind. 510 ; *Mansfield v. Shipp*, 128 Ind. 55 ; *Tewksbury v. Howard*, 138 Ind. 103.

An objection to the form of the judgment, by means of a motion to modify the same, must point out the particulars in which the judgment is supposed to be wrong in form, and specify the particular change or modification that is desired by the mover. These matters and the action of the court on the motion—especially if the motion is overruled as was the case here, and the exceptions thereto—are not a part of the record unless made so by bill of exceptions or order of court. *Benefiel v. Aughe, supra*.

The civil code provides that “ All proper entries made by the clerk, and all papers pertaining to a cause, and filed therein (except a summons for the defendant, where all persons named in it have appeared to the action, and summons for witnesses, * * and other papers which are used as mere evidence), are to be deemed parts of the record ; but a transcript of motions, affidavits and other papers, when they relate to collateral matters, and depositions and papers filed as mere evidence shall not be certified unless made a part of the record by exception or order of court and directed to be certified by the appellant. * * * Every paper and pleading above excepted may

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be made part of the record by exceptions or order of the court, on motion." (R. S. 1881, section 650 ; R. S. 1894, section 662.)

What purports to be the motion to modify in this case is copied into the transcript immediately following the judgment and decree, and immediately following the motion is the following entry: "And the court having heard said motion overrules the same, to which ruling of the court, the defendant at the time excepts and the same is now ordered to be made a part of the record."

The provision in the section quoted authorizing extrinsic matter to be made a part of the record by order of court is confined exclusively to papers and documents. The order is too indefinite. The motion, the ruling thereon and the exception thereto had all preceded the order, and it says the same is ordered to be made a part of the record.

Such an order ought to designate and point out with reasonable certainty the extrinsic matters it seeks to make a part of the record. It ought not to be left to inference, speculation or surmise what matters are thus made a part of the record; whether the motion, the ruling thereon, or the exception, or all of them were made a part of the record, is left to conjecture or surmise.

The motion, ruling thereon, and exception thereto not being a part of the record, the judgment is affirmed.

HOWARD, J., took no part in this decision.

Filed November 6, 1895.

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No. 16,815.

THE LOUISVILLE, NEW ALBANY AND CHICAGO R. W.
 Co. AND THE TOLEDO, ST. LOUIS AND KANSAS
 CITY R. R. Co. v. TREADWAY.

142	475
145	256
142	475
171	170

APPELLATE PROCEDURE.—*Judgment Reversed as to One Joint Defendant and Affirmed as to Another.*—*Special Verdict.*—A judgment rendered upon a special verdict may be reversed as to one joint defendant and affirmed as to the other, under the statute authorizing a judgment against one alone of several joint defendants, although there is no apportionment of the damages assessed between the defendants.

From the Putnam Circuit Court.

C. Brown, S. O. Bayless, C. G. Guenther, G. W. Kretzinger and *B. Clark*, for appellants.

B. Crane and *A. B. Anderson*, for appellee.

MONKS, J.—Appellee brought this action against appellants, the Louisville, New Albany and Chicago R. W. Co., commonly called the “Monon,” and the Toledo, St. Louis and Kansas City R. R. Co., commonly called the “Clover Leaf,” to recover damages for injuries alleged to have been received by her at a depot used and maintained by appellants.

Appellants each filed separate demurrers to the complaint, for the reason that the same did not state facts sufficient to constitute a cause of action, which demurrers were overruled by the court, and exceptions were reserved.

The “Monon” filed an answer in two paragraphs, to the second of which appellee’s demurrer was sustained, and exception taken. The “Clover Leaf” filed an answer in one paragraph. The cause was tried by a jury, and the special verdict returned; thereupon each appel-

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lant filed a separate motion for judgment in its favor on the special verdict, which motions were overruled; to which action of the court appellants each excepted. The court rendered judgment on the special verdict, in favor of appellee, against appellants, to which appellants severally excepted.

Appellants then filed their separate motions for a new trial, which were overruled and exceptions reserved.

Appellants separately assign errors in this court; the reasons urged for a reversal are:

First.—That the court erred in overruling the demurrer of each appellant to the complaint.

Second.—That the court erred in overruling the separate motion of each appellant for a new trial.

Third.—That the court erred in overruling the separate motion of each appellant for a judgment in its favor on the special verdict.

The complaint was sufficient to withstand the demurrers of appellants. The objections urged thereto, so far as it charges negligence, could be reached by a motion to make more specific, but not by demurrer. Neither were the specific statements as to the conduct of appellee sufficient to overthrow the general allegation that appellee was injured without any fault or negligence on her part. *Pennsylvania Co. v. O'Shaughnessy, Admr.*, 122 Ind. 588, and cases cited; *City of Elkhart v. Witman*, 122 Ind. 538, and cases cited; *Town of Rushville v. Adams*, 107 Ind. 475.

It is unnecessary to set forth the complaint or the substance of the same, as substantially the same questions are presented upon the special verdict.

The special verdict, so far as necessary to determine the question presented, is:

That the "Monon" railroad runs north and south through the town of Linden, and the "Clover Leaf" runs

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east and west through said town ; that on the 19th day of January, 1891, and for five years prior thereto, there was located at the intersection of said railroads, and in the southeast angle thereof, a station, consisting of a depot building and adjacent platforms, which were on said day, and for five years prior thereto, used and maintained by appellants for the reception and discharge of passengers on appellants' trains respectively, and for the accommodation of persons taking passage on either of said railroads, and for the convenience of persons transacting, or intending to transact, business with either of said companies ; that said depot was constructed and maintained about midway between the tracks of said railroads, and facing the intersection thereof, about thirty-five feet from said intersection, and consisting of a waiting room for passengers, a telegraph and ticket office and freight room, the waiting room being at the end nearest to the public highway, and the ticket and telegraph office being between said waiting room and said freight room ; that the space between said depot building and said railroad track was covered by a plank platform, which extended around said building at the northeast end thereof to a line running north and south through the east corner of said building ; that said platform extended south from the south side of the track of the "Clover Leaf," along the east side of the track of the "Monon," about one hundred and thirty feet, and east from the east side of the track of the "Monon," along the south side of the track of the "Clover Leaf," about one hundred and forty feet, to a public highway running north and south, and crossing the last named railroad, which highway furnished the only public approach to said station the part of said platform which extended east from the line running north and south through the east corner

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of said building to said highway being seven feet and four inches wide; that the surface of the ground descended from said highway to the depot building, so that the platform at the northeast end of said building was from three and one-half to four feet above the surface of the ground; that said platforms were used and maintained without guards, guard-rails, railing or barriers of any kind to prevent or protect passengers or other persons having business with said company or either of them, from falling or stepping off said platform at the northeast end of said building, and the erection and maintenance of guards, guard-rails, railings or barriers on the edge of the platform at the northeast end of said building would not have materially interfered with the business of said appellants in the handling of baggage and freight of said station; that said appellants used and maintained said station and platform in their business in the condition aforesaid, on said 19th day of January, 1891, and for several years prior thereto, and during all of said time knew of the dangerous condition thereof; that on said 19th day of January, at about one and a half o'clock, A. M., appellee went to said station for the purpose of taking, and intending to take, passage on the passenger train of the "Monon," going north on said road at about two o'clock and nineteen minutes, A. M., from said station to the station of Hammond, Indiana, both of said stations being regular stopping places for said train, and appellee at the time holding a ticket entitling her to passage on said train from said station of Linden to the station of Hammond; that when appellee went to the station at Linden the depot and waiting room thereof were open for the reception and accommodation of passengers and persons intending to take passage on trains of the "Monon;" that the "Clover Leaf" ran no passenger trains at said time

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between the hours of six o'clock P. M. and six o'clock A. M., and appellee transacted no business with said last named company; that said appellee approached the station from the highway hereinbefore mentioned, and walked along said platform from the highway to the entrance of the waiting room, and entered the waiting room to await the arrival of the train; that there was no light or fire in the waiting room, and appellee was invited, by the agent of the said appellants, to enter the ticket and telegraph office, and she did enter said office to wait for said train; that appellee was ignorant of the condition of said platform and of the fact that it was unsafe and dangerous and not provided with guards, guard-rails, railings or barriers of any kind as aforesaid, and that said platform, extending to said highway, did not cover all the space between said depot building and the highway; that while appellee was waiting for said train, it became necessary for her to leave said depot and waiting room temporarily, to attend to a necessary and urgent call of nature; that there was no water-closet or privy in or near said depot grounds to which she could go for such purpose, and for the purpose of attending to said call of nature appellee, at about two o'clock A. M., temporarily left said depot building and went out upon said platform and attempted to leave the same by the same route by which she approached said waiting room and depot, and started in that direction, intending to return to said depot building as soon as she had attended to said call; that it was dark and there were no lights about said depot on said platform, nor any means to enable plaintiff to see the edge or termination of said platform, or the dangerous condition thereof; that in attempting to leave said depot and platform, as aforesaid, appellee walked along at a moderate gait, proceeding carefully and cautiously, and on that part of said platform at the

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northeast end of said building and at a point about seventeen feet from the door of said waiting room, stepped and fell off said platform, and was thrown violently to the hard ground below, a distance of about four feet; that appellee stepped and fell off said platform by reason of the fact that there were no guards, guard-rails, railings, or barriers or other protection on the edge of said platform, at the northeast end of said depot building, at the point where said appellee stepped and fell off as aforesaid, and by reason of the fact that there were no lights upon the platform or about said premises to enable appellee to see the edge of said platform or to ascertain the fact that said platform at the point where she fell off was from three and one-half to four feet above the surface of the ground; that when appellee went to the station she approached the same from the highway aforesaid and walked along said platform along the south side of the "Clover Leaf" railroad from said highway, in company with one George Wright, who was familiar with said depot and platform and the surroundings, up to and into said waiting room; that, when appellee got up to leave said ticket and telegraph office and said waiting room to answer said call of nature, she saw no light except one lamp on the wall in the ticket and telegraph office, and saw no lantern whatever, although a lighted lantern was on the floor of the office at the time, and she did not ask the agent or Mr. Wright to show her out of the depot; that at said time appellants employed the same agent and telegraph operator, who sold tickets and transacted business for appellants at said station; that, in the year 1882, plaintiff's son was the day operator at said station, and appellee, in the spring of said year, visited her son at Linden and spent two or three hours on two or three different days visiting her son at the ticket and telegraph office in said

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station during the day time; that she approached said station from the boarding house of her son in Linden, by walking along the track of the "Monon" railroad, and did not on any occasion during said visit approach said station from the highway, and she did not visit or inspect that portion of said platform at the northeast end of said building, where she afterwards stepped and fell off, as aforesaid; that in November, 1890, appellee brought the dead body of her son from Hammond, Indiana, to Linden for burial, and she alighted from the cars of the "Monon" railroad at said station on the west side of said platform; that she was met at the station by friends who conducted her to a conveyance on said highway and a few days thereafter she returned to said station from said highway in company with friends; that at the time of her arrival and departure she was heavily veiled and had no occasion to, and did not, notice the condition of said platform; that these were the only times she was ever at said station prior to the time she received her said injuries; that the "Clover Leaf" railroad company maintained that part of the platform extending east along the line of its track, and the "Monon" company that part which extended south along its track; that by reason of appellee's stepping and falling off said platform as aforesaid and coming violently in contact with the hard ground, she was seriously hurt, etc.; that, during all the time from her arrival at said station, on the 19th day of January, 1891, to the occurrence of such fall and injury, the appellee was exercising such care, caution and prudence as persons of ordinary prudence would, and do, exercise under like circumstances.

It is settled law, in this State, that it is the duty of a railroad company to keep in safe condition all parts of its platforms, with the approaches thereto, to which the

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public would naturally resort, so as to furnish safe ingress and egress for, and to prevent injury to, its passengers who come upon them; and within a reasonable length of time before the arrival and departure of trains, in the night time, to properly light its waiting rooms, and the platform connected therewith, and approaches thereto, so as to make them comfortable and safe for the use of the passengers wishing to take passage on its trains. For a breach of this duty, it is liable, and must respond in damages to a passenger who, without fault on his part, is injured by the negligent failure to perform such duty. *Ohio, etc., R. W. Co. v. Stansberry*, 132 Ind. 533 (536), and cases cited; *Louisville, etc., R. W. Co. v. Lucas*, 119 Ind. 583, and cases cited. It is not, however, its duty to keep its waiting room and platform lighted in the night time at unreasonable hours, depending upon the size and importance of the station. *Louisville, etc., R. W. Co. v. Lucas, supra*, and cases cited on pp. 589, 590; 2 Wood Railroads (ed. of 1894), section 310, and cases cited; *Heinlein v. Boston, etc., R. R. Co.*, 147 Mass. 136; 9 Am. St. Reports, 676.

Appellee, upon her arrival at the station, became entitled to all the rights, privileges and protection of a passenger from the "Monon" company.

It is urged by appellants that the court erred in rendering judgment in favor of appellee on the special verdict.

The special verdict states that the platform was not lighted, and it is clearly shown that the negligence of the "Monon" company, in leaving the platform described in the verdict without lights, was guilty of negligence, and that the same was the proximate cause of the injury. *Louisville, etc., R. W. Co. v. Lucas, supra*.

Appellee clearly had the right to retire from the depot

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for the purpose stated in the special verdict, and while so doing, and in returning again, she was entitled to the protection of a passenger, and the duty of the "Monon" to her as such continued. Appellee started to go from the station by the same way she approached. She did not intend to step off the platform when she did (as was the case in some of the authorities cited by appellants). Had she gone a few feet further north before turning east, she would have passed out in safety to the highway. If the platform had been lighted, she would have seen the platform leading to the highway, and passed out without being injured.

This is not a case where the injured party was attempting to step off the platform, not knowing the depth, as in *Forsyth v. Boston, etc., R. R. Co.*, 103 Mass. 510, cited by the appellants, but is a case where the injured party was seeking to go out by the way the "Monon" company was required to make safe to its passengers, at night, by lighting the same. This it negligently failed to do.

Counsel for appellants upon this point say: "But even though appellants were clearly negligent in not having the front part of the platform lighted; that is, that part of the platform which lies between the front of the depot or door of the depot, and the train or track upon which trains pass, such negligence could not have contributed to the accident, because, even if the platform had been so lighted, the light would not have extended to the point of the accident." Lighting the platform between the depot and track alone would not have been sufficient under the law, the platform extending to the highway must also have been lighted to comply with the rule, and if it had been so lighted, no matter where the light was placed, appellee, as the jury find, would not have gone to the place of the accident, whether the light extended there or not, but would have walked out over the

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platform to the highway ; this is what she was endeavoring to do when she was injured.

It is earnestly insisted by appellants that there are no facts found from which the court can conclude that appellee was exercising due care ; that the finding on this subject consists wholly of conclusions of law. The statements in the special verdict concerning the care exercised by appellee are substantially the same as those in the special verdict in the case of *Louisville, etc., R. W. Co. v. Lucas, supra*, which was sustained by this court. *Terre Haute, etc., R. R. Co. v. Brunker*, 128 Ind. 542 (547-548).

Judgment on the special verdict was properly rendered against the "Monon" company.

It clearly appears from the evidence, that appellants used that part of the platform where appellee stepped off for loading and unloading vehicles, hauling baggage and freight to and from the depot. Appellants were not required to erect barriers of any kind at that point, and were not negligent for not so doing. The jury in the special verdict find otherwise ; and such finding is not supported by the evidence. If, however, the finding of the jury concerning the necessity of barriers were eliminated from the verdict the judgment thereon would necessarily be the same against the "Monon" company ; such finding therefore is harmless. The negligence consisted in not lighting the platform and approaches, and not in failing to erect barriers.

It was proper to state in the special verdict that there were no barriers, and also the elevation of the platform above the ground as showing the danger in the night time when not lighted and therefore the greater necessity for lighting the same.

In other respects the evidence supports the finding,

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and the "Monon" company's motion for a new trial was properly overruled.

A different question, however, is presented by the "Clover Leaf" company. The appellee did not go to the depot on any business with that company whatever; that company owed her no such duty as the law imposes upon a common carrier to its passengers. The "Clover Leaf" company, at that time, had no trains running at night carrying passengers over its road either to or from that station, and therefore was under no duty to light the platform or approaches thereto. Before this appellant can be held liable to appellee, it must be shown that, at the time and place mentioned, it was under some legal duty to appellee, which it failed to discharge. *Evansville and Terre Haute R. R. Co. v. Griffin*, 100 Ind. 221; *Pennsylvania Co. v. Shaughnessy*, *supra*; *Indiana, etc., R. R. Co. v. Barnhart*, 115 Ind. 399 (408); 2 Wood Railroads, sections 310 and 310a, *supra*; *Davis v. Central Cong. Society*, 129 Mass. 367; 16 Am. and Eng. Ency. of Law, pages 414, 415.

The case of *Lucas v. Pennsylvania Co.*, 120 Ind. 205 (cited by the "Monon" company), is not an authority here; the injured party in that case had alighted from the train of the "Monon," and was making her way over a platform to the proper place to take passage on the train of the Pennsylvania Co.; she was entitled to protection, as a passenger, from both companies. In that case the platform was old, decayed and greatly dilapidated and out of repair, and there was a hole in the same caused by the breakage of planks therein, of the size and space of three to five feet either way, which was open and "wholly unguarded;" such a place was a trap. In this case the platform was in good repair and was safe by day, and if properly lighted was safe in the night time. In that case both companies owed the

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injured party a duty because she bore the relation of passenger to each. In this case the "Clover Leaf" owed no duty to appellee more than it did to the general public, so far as lighting the platform was concerned. 2 Wood Railroads, (2nd ed.), page 1345; *Montgomery R. R. Co. v. Thompson*, 77 Ala. 448 (54 Am. Rep. 72), and authorities cited, *supra*.

The court therefore erred in overruling the "Clover Leaf's" motion for a judgment in its favor on the special verdict.

Judgment affirmed as to the Louisville, New Albany and Chicago Railway Company, and reversed as to the Toledo, St. Louis and Kansas City Railroad Company, with instructions to sustain its motion for a judgment in its favor on the special verdict.

Filed May 28, 1895.

ON PETITION FOR REHEARING.

MONKS, J.—An earnest and able petition for rehearing has been filed by the "Monon" company.

It is claimed "that this court erred in reversing the judgment as to the 'Clover Leaf' company and affirming it as to the 'Monon' company because a judgment at law cannot be reversed as to one joint defendant and affirmed as to the other."

The authorities cited by appellant in support of the rule asserted can have no force in this State, for the reason that the question is regulated by our code of civil procedure. Section 570, R. S. 1881; section 579, R. S. 1894, provides: "Though all the defendants have been summoned, the judgment may be rendered against any of them, severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them severally."

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Section 568, R. S. 1881; section 577, R. S. 1894, provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

Section 569, R. S. 1881; section 578, R. S. 1894, provides that "In a suit against several defendants, the court may, in its decision, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper."

Under these sections it has been held by this court that the trial court possessed chancery powers in adapting its judgment to the rights of the parties. *Draper v. Vanhorn*, 12 Ind. 352; *Douglass v. Howland*, 11 Ind. 554; *Cutchen v. Coleman*, 13 Ind. 568; *Home Ins. Co. v. Gilman, Exr.*, 12 Ind. 7 (9).

That if a plaintiff sue two or more jointly and only prove a liability as to one, he is entitled to a judgment against that one. *Stafford v. Nutt*, 51 Ind. 535, and cases cited on page 538; *Louisville, etc., R. W. Co. v. Duvall*, 40 Ind. 246; *Moyer v. Brand*, 102 Ind. 301 (306); Thornton Ind. Prac. Code, annotated, sections 568, 569, 570, and notes.

In *Lower v. Franks*, 115 Ind. 334, on p. 337, this court, in speaking of the foregoing sections of the code of civil procedure, said: "In the case of *Hubble v. Wolf*, 15 Ind. 204, following the case of *Blodgett v. Morris*, 14 N. Y. 482, it was held in terms that this provision of the code applies to all actions indiscriminately, whether founded upon contract, or upon tort; that it is immaterial whether the complaint alleges a joint or a joint and several liability; that the right of recovery is, in this respect, to be regulated by the proof, and not

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by the allegations of the complaint; that, in other words, every complaint is, in the respect stated, to be treated as both joint and several where there are two or more defendants; that the object of the provision obviously is to prevent a plaintiff who proves a good cause of action against part of the defendants, but not against all, from being put to the expense and delay of a new action." In this case each appellant separately moved the court below to render judgment in its favor, which motions were each overruled, and the judgment rendered against both appellants. The Clover Leaf's motion for a judgment in its favor on the special verdict should have been sustained, and judgment rendered by the court accordingly. The mandate of this court merely directs the court below to render the judgment that should have been rendered in the first instance. The Monon company is in the same situation as if the court below had sustained the motion of the Clover Leaf company, and rendered judgment in its favor, and the Monon company had alone prosecuted this appeal. Besides, it is expressly provided by statute that this court may reverse a case in whole or in part. Sections 660, 661, R. S. 1881; sections 672, 673, R. S. 1894.

It has been uniformly held by this court, since the code of civil procedure took effect in 1853, that a case may be reversed as to a part of the appellants, and affirmed as to others, and such has been the uniform practice. *Louisville, etc., R. W. Co. v. Duvall*, *supra*; *Steeple v. Downing*, 60 Ind. 478 (503-504); *Dodge v. Dunham*, 41 Ind. 186; *State, ex rel., v. Mills*, 82 Ind. 126; *Lower v. Franks*, *supra*; *Citizens' Street R. W. Co. v. Robbins, Admr.*, 128 Ind. 449; *Haxton v. McClaren*, 132 Ind. 235; *English v. Aldrich*, 132 Ind. 500; *Spaulding v. Spaulding*, 133 Ind. 122;

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Eppert v. Hall, 133 Ind. 417; *Haskett v. Maxey*, 134 Ind. 182; *Irey v. Mater*, 134 Ind. 238; *Clark v. Hillis*, 134 Ind. 421; *Duckwall v. Kisner*, 136 Ind. 99; *Offutt v. Cooper*, 136 Ind. 701; *Small v. Kennedy*, 137 Ind. 299; *Radican v. Buckley*, 138 Ind. 582; *Flora v. Russell*, 138 Ind. 153; *Garr, Scott & Co. v. Shaffer*, 139 Ind. 191.

This cause was not reversed upon the evidence as to the Clover Leaf company, as stated in the petition for a rehearing, but upon the special verdict, for the reason that the facts stated in the special verdict entitle the Clover Leaf company to a judgment. It is insisted that the cause should be reversed as to the Monon company, for the further reason "that an invisible and inseparable part of the damages assessed by the jury, was essentially assessed against the Clover Leaf company." No part of the damages assessed by the jury was assessed against either company, but the amount fixed was such as, in the judgment of the jury, would compensate appellee for her injuries. It was left to the court to say, as a matter of law, whether judgment should be rendered for the same against both, or only one of the appellants.

The other questions presented in the petition for a rehearing were fully considered and determined in the original opinion.

The petition is, therefore, denied.

Filed November 6, 1895.

No. 17,204.

STOTSENBURG, ADMR., v. FORDICE ET AL.

142	490
143	533
142	490
147	700

APPELLATE PROCEDURE.—*Rehearing.*—*Points Which Will Not Be Considered.*—Points not specifically made in the original briefs cannot be made on petition for a rehearing in the Supreme Court.

PROMISSORY NOTE.—*Recovery of Interest Paid in Excess of Contract Rate.*—*Mistake of Fact.*—*Assumpsit.*—Payment of interest on a note, in excess of the contract rate, under a mistake of fact, may be recovered back whether or not the mistake was mutual.

DEMAND.—*Note.*—*Payment of Excessive Interest.*—*Answer.*—*Cross-complaint.*—No demand is necessary before an answer, in an action on a note, claiming payment of excessive interest under a mistake as to the contract rate.

PLEADING.—*Set-Off.*—*Counterclaim.*—*Partial Answer.*—A plea setting up a set-off or counterclaim to part of the claim sued on is not bad in failing to respond to the balance, although it is directed to the entire cause of action.

From the Floyd Circuit Court.

G. H. Voight and *E. B. Stotsenburg*, for appellant.

A. Dowling, for appellees.

HACKNEY, J.—In November, 1866, one Maginnis executed to the appellant's predecessor three promissory notes, each for \$1,627.27, "with interest at the rate of six per cent., payable semi-annually and specifically in gold coin." To secure said notes he executed his mortgage on certain real estate. In November, 1871, Maginnis conveyed the real estate to the appellee Fordice, and one Devol, who assumed the payment of said mortgage. In November, 1877, what was supposed to be one-half of said debt was paid. In May, 1892, by order of the Floyd Circuit Court, in partition, said real estate, as the property of said Fordice and Devol, was sold to the appellee John B. Lloyd who assumed

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said mortgage. This suit was by the appellant for a personal judgment against said Fordice and Lloyd and the foreclosure of said mortgage against them and the appellee Etta B. Lloyd. The fourth paragraph of the separate answers each of Fordice and of Lloyd and wife, was as follows: "And the defendants * * by way of amended fourth paragraph of answer herein says that by mistake of the agents of said Fordice as to the rate of interest upon said notes, the said defendant, Fordice, by his agents, paid to the predecessors of the plaintiff in his said trust, interest on the notes mentioned in the complaint at the rate of eight per cent. instead of six per cent. That such mistake was made in each payment of interest on said notes from the 13th day of November, 1867, until the 11th day of February, 1892, said payments being made annually from said first named date until the date last mentioned; that by reason of the excess of interest so paid by mistake, the defendant is entitled to an annual credit upon the principal of the notes sued on, of thirty-two dollars and fifty-five cents (\$32.55), and to a total credit upon the principal of the notes sued on of eight hundred and seventeen dollars and fifty cents (\$817.50). Wherefore he prays judgments, etc." Upon the overruling of the appellant's demurrers to said answers, for the want of sufficient facts, the appellant filed replies, and the court, upon final hearing, rendered a special finding and gave the appellant judgment and decree for the principal and interest sued for, less the amount found to have been overpaid on account of interest and by reason of said alleged mistake. The appellant's complaint in this court is of the overruling of said demurrers and in denying him a new trial.

The first proposition advanced is that the answer in question was but a partial answer while pleaded in bar

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of the entire cause of action. A well known rule of practice is that which holds that a partial defense pleaded in bar of an entire cause of action is unavailing. However, it is now well settled that where the plea is not, strictly speaking, a defense to the cause of action, but sets up a cross-demand, such as set-off or counterclaim, it is not bad in failing to respond to so much of the claim sued upon as may be in excess of the set-off or counterclaim, though it be directed to the entire cause of action. *Curran v. Curran*, Admr., 40 Ind. 473; *Dodge v. Dunham*, 41 Ind. 186; *Mullendore v. Scott*, 45 Ind. 113; *Law v. Vierling*, 45 Ind. 25.

The appellant assails this answer further because (1) no deceit or concealment was practiced on Fordice; (2) mistake to operate as a defense must be mutual, or it must be shown that surprise or imposition existed; (3) the payments were not shown to have been compulsory or involuntary; (4) Fordice and Floyd were strangers to the original transaction, and could not take advantage of the payment of usurious interest; (5) that demand for repayment should have been alleged.

In *Brown v. College Corner, etc., Co.*, 56 Ind. 110, a complaint to recover money paid by mistake of the payor, was held sufficient without allegations of fraud, concealment, mutuality of mistake, or compulsory payment. An objection there expressly made was that no fraud or concealment was alleged, and that if the payor did not know the facts, and the state of the accounts with the payee, it was his neglect, and, therefore, no remedy existed.

It was said in that case: "It is well settled that money paid under a mistake, on the part of the payor, of a material fact, can be recovered back. 2 Chitty Cont., 11 Am. ed., 928, and authorities there cited. On the subject of laches on the part of the party paying the

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money, and seeking to recover it back, we quote the following passages from the volume above cited, at page 930. 'And, in the above case, Bayley, J., said: If a party pay money under a mistake of the real facts, and no laches is imputable to him, in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money.' But the rule on this subject has ceased to be thus limited; it being now held, that the possession of the means of knowledge by the party who paid the money, can be regarded only as affording a strong observation to the jury, to induce them to believe that he had actual knowledge of the circumstances; but that there is no conclusive rule of law, that because a party has the means of knowledge, he has the knowledge itself.' A similar case is that of *Lewellen v. Garrett*, 58 Ind. 442. There the rule of recovery was quoted from *Guild v. Baldridge*, 6 Swan (Tenn.) 295, as follows: "'The right of recovery proceeds upon the ground that the plaintiff has paid money, which he was under no obligation to pay, and which the party to whom it was paid had no right either to receive or to retain, and which, had the true state of facts been present in his mind, at the time, he would not have paid.'" In *Worley v. Moore*, 97 Ind. 15, the rule recognized was that where the facts showed that the payee could not in good conscience retain the money, it could be recovered. It is true that the opinion stated that in that instance the mistake was mutual, but it was not held that recovery depended upon the mutuality of the mistake, nor was fraud or concealment held to be essential.

In *City of Indianapolis v. McAvoy*, 86 Ind. 587, it was held that the failure to employ the means of knowledge which would disclose the mistake does not preclude recovery.

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In *Ingalls v. Miller*, 121 Ind. 188 (190), is the following statement of the rule: "Where money is paid upon the supposition that a specific fact, which it was supposed would entitle the other to maintain an action, is true, which fact is not true, an action will lie to recover the money back, 'upon the ground that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid had no right either to receive or retain, and which, had the true state of facts been present in his mind, at the time, he would not have paid.' *Guild v. Baldrige*, 32 Tenn. 293; *Lewellen v. Garrett*, 58 Ind. 442; *Brown v. College Corner, etc.*, *G. R. Co.*, 56 Ind. 110; *Cross v. Herr*, 96 Ind. 96." See also *Grimes v. Blake*, 16 Ind. 160; 15 Am. and Eng. Ency. of Law, p. 677; *Baltimore, etc.*, *R. R. Co. v. Faunce*, 46 Am. Dec. 655. In the last case it was held that money paid in consequence of a mistaken view of the facts, cannot be a voluntary payment. To the same effect is the rule as stated in Bishop on Contracts, sections 632, 633.

It is clear that in the reformation of contracts which are alleged to misstate the intention, it must appear that the mistake is that of all of the parties, otherwise a new contract would be made, and the terms of the first would be varied to meet the mind of but one of the parties, and not to conform to the conditions upon which the minds of both parties met in the original transaction. But we do not see any good reason for applying the rule of mutuality where recovery is sought for moneys paid under a mistake of fact to one not entitled to receive it. Suppose the mistake is as to the identity of the creditor, and money owing to A is paid to, and received by B, the fact that B does not participate in the mistake, but submits his willing hands to the receipt of the money should not, in good conscience, permit B to retain the

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money when the debtor discovers his mistake. Nor do we observe a better reason for enforcing the rule of mutuality where the mistake consists in paying to the proper creditor, by mistake, more than he was entitled to receive. But, even where written agreements are sought to be reformed, the rule as to mutuality of mistake is not unbending. In *Roszell v. Roszell*, 109 Ind. 354, (p. 356), it is said: "If it appears that the mistake was known to one of the parties, who, with knowledge of the ignorance of the other, nevertheless kept silent when he should have spoken, the party having knowledge will be estopped to defeat a reformation by alleging that he knew that the instrument was different from the agreement." This proposition, it seems to us, should receive added force when applied to the case of one who has received, by the mistake of another, that to which he was not entitled, but which he may have accepted with knowledge of the mistake.

In Kerr on Fraud and Mistake, p. 415, the rule is stated more strongly than is necessary to support our conclusion. "Money paid voluntarily, under mistake of fact, is recoverable both at law and in equity, unless it be clear that the party making the payment intended to waive all inquiry into the facts. It is not enough that he may have had the means of learning the truth if he had chosen to make inquiry. The only limitation is that he must not waive all inquiry."

The issue tendered by the answer requires no inquiry as to the collection or recoupment of usurious interest paid nor as to the privilege of Fordice and Lloyd to take advantage of any such payments. The contract rate was not usurious and the excess was alleged to have been paid by mistake as to the contract rate and not pursuant to contract. It was not essential to the maintenance of the appellees' claim, as pleaded in the answer in

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review, that a demand should have been made, before answering, for the repayment of the sums paid by mistake or for credit therefor upon the notes. The suit of the appellant excused the demand, if one was necessary. *Harshman v. Mitchell*, 117 Ind. 312; *Stix v. Sadler*, 109 Ind. 254; *McClanahan v. Williams*, 136 Ind. 30. We are of opinion that the fourth answer of Fordice was not bad for any of the reasons urged against it.

The fourth answer of Lloyd is attacked for all of the reasons pressed against the answer of Fordice and upon the additional objection that Lloyd was not a party to the mistake of Fordice and would not be injured thereby, but that he had notice, by the proceedings in partition, that he was assuming the principal of the debt. The partition proceedings were not before the lower court by the allegations of the answer and could form no basis for an objection to the answer. The answer responded to the complaint which, in theory, charged both Lloyd and Fordice as privies to the transaction with the original debtor and the answer was not objectionable in pleading facts which showed that the assumption was of a debt diminished by payments and by the existence of claims which should be deemed a compensation, in part, of the claim sued upon.

The question is suggested that the judgment was not sustained by the evidence. The well known rule that this court will not weigh the evidence and pass upon the question of its weight and preponderance renders it necessary only that we should ascertain that there was evidence supporting the judgment. The evidence without conflict shows that the notes provided but six *per centum* as interest and that the payments made were at the rate of eight *per centum*. It also appears that for one or two years, of the payments by Fordice, he paid eight *per centum* in currency as the equivalent of six

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per centum in gold, gold then bearing a premium, and that subsequently his payments were gauged by the amount he had first paid, though gold did not then bear a premium, and were made by his agents who were governed by the former payments and did not know the contract rate. This it seems is sufficient to bring the case within the rules suggested with reference to the sufficiency of the answer of Fordice.

Finding no error in the record, the judgment is affirmed.

Filed September 17, 1895.

ON PETITION FOR REHEARING.

HACKNEY, J.—On the original hearing it was expressly conceded by appellant's learned counsel that interest had been paid upon the note sued on, in excess of the contract rate, for the period of twenty-one years. In the judgment of the circuit court, there were allowed credits for such excessive payments, for thirteen years. Upon the propositions stated in the original opinion, the appellant insisted that all credits so allowed were erroneous. There was no effort to discriminate between credits, but all were treated as occupying the same status, and required to stand or fall by the strength of the propositions so stated. Now appellant seeks a rehearing, insisting that we take up two or three of the many credits and consider the evidence with reference to them separately, and to hold that they were not supported. In other words, the existence of evidence, admitting credits generally, was denied upon the theories stated in the original opinion, and now it is insisted that particular credits were not authorized by the evidence, upon the same theories. We held against the abstract theories of the appellant, and found evidence supporting—not merely tending to support—credits generally, upon

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the question of a mistake in the making of excessive payments.

Upon the question now presented, the rule of practice is well established by this court, that points not specifically made in the original briefs, cannot be made on petition for a rehearing. See Elliott App. Proced., section 557, and authorities cited. We decline, therefore, to again look into the evidence, and upon this question hold that appellant has waived the inquiry. Other questions are suggested by counsel, but as they were fully considered and decided on the original hearing, and adhering to the conclusions then reached, the petition is overruled.

Filed November 6, 1895.

No. 17,488.

COLE v. TEMPLE.

142	498
150	396

ESTOPPEL.—Married Woman.—Surety.—Mortgage.—Note.—A wife is not estopped to deny that she executed notes and a mortgage as surety merely for her husband, by a recital in the mortgage that the mortgagors convey the real estate and also the stock of goods, which was the consideration of the notes, that “we” have purchased from the mortgagee, and that “we” acknowledge that we own the real estate in equal shares, where she had nothing to do with the sale except to sign the notes and the mortgage at the request of her husband after it was consummated. .

From the Crawford Circuit Court.

R. J. Tracewell and *A. W. Funkhouser*, for appellant.

J. H. Weathers, *J. L. Suddarth* and *C. W. Cook*, for appellee.

Cole v. Temple.

HOWARD, C. J.—The appellee, as assignee of one Stephen C. Patton, is the holder of the notes and mortgage in suit. These notes and the mortgage were executed to the said Patton by the appellant and her then husband, Dr. William A. Cole, since deceased. Appellant and her said husband were the owners of the real estate in controversy, being part of a lot situated in the town of English. She had inherited property from her father, and had exchanged the same for other property. The real estate here in controversy was part of the property so received in exchange by her, and the deed for the same was made to her and her said husband.

Prior to August 18, 1891, the said Patton, appellee's assignor, was the owner and in the possession of a stock of drugs kept in a store room situated on the said town lot of appellant and her husband, Patton being their tenant. On the trial, Patton testified that for ten days or two weeks prior to said date, negotiations were pending between him and appellant's husband, the said Dr. William A. Cole, for the sale of the drugs to the latter. They finally agreed on the terms of sale. Dr. Cole was to pay \$1,300 for the stock, \$300 cash and the balance in notes on personal surety. The persons proposed and accepted as surety, however, refused to sign the notes with the doctor.

Cole then proposed, as Patton testifies, that he and his wife, the appellant, should purchase the stock jointly, and that he and his wife should execute their notes for the unpaid balance; and to secure said notes would give him a mortgage upon the lot and store room in question. To this Patton agreed. The \$300 was paid, the invoice made, and the drug stock turned over to Dr. Cole on the 18th of August, 1891.

The appellant was not present during any of these

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transactions, and took no part in the negotiations. She was then and had been for sometime on a visit at Paoli, eighteen miles distant from English. Dr. Cole, however, represented that he was acting for his wife. Patton, at the time of the sale did not think that Dr. Cole had any property and believed that the store room and lot came to the appellant, Mrs. Cole, through her father's estate. He never spoke to Mrs. Cole about her title to the lot, and did not go to Paoli to see her about the sale of the drugs. After the sale Dr. Cole went to Paoli and procured the execution of the notes and mortgage by his wife.

Over the objection of the appellant the foregoing testimony by Patton was admitted by the court, not for the purpose of showing that Dr. Cole was agent for his wife, but only as to the nature of the trade between the parties. No other evidence was offered to prove that Dr. Cole was agent for his wife.

The appellant testified: "When I signed the mortgage it was the first I knew of the purchase of the drug store. I had no interest in the purchase of the drug store, and did not have any interest in the store. All I know about was, Dr. Cole and Mr. Throop, an attorney, brought the mortgage to me at Paoli, and my husband wanted me to sign it. I signed it."

On cross-examination, she said: "I had no conversation with Patton about buying the drug store, at or before the sale. I do not remember that Dr. Cole, my husband, had talked about buying the drug store before I went to Paoli. I had nothing to do with the drug store. It was not understood that I was to help the doctor in buying it. I first heard about it on the Wednesday after the trade was made. * * * I did not examine the mortgage. My husband came into the

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room where I was, and then we went into the room where Mr. Throop was and I signed the mortgage. The mortgage was not read to me. The doctor called me into the room where Mr. Throop was and told me to put my name to it. I knew it was a mortgage to secure the notes for the drug store. My husband did not tell me that he and I were to buy the drug store together."

No other evidence was given inconsistent with the foregoing, and bearing upon the question at issue, namely, the alleged obligation of appellant as joint purchaser of the stock of drugs, unless it be the recitals in the mortgage.

The mortgage, which was executed by appellant and her husband, recites that the parties convey the real estate, "and also the stock of goods that we have purchased from Stephen C. Patton, consisting of drugs, etc., * * * to secure the payment of two promissory notes, dated August 18, 1891, and made by said William A. Cole and Alice J. Cole, payable to said Stephen C. Patton, each for five hundred dollars." Other like recitals follow, including the statement: "We hereby acknowledge that we own the above described real estate in equal shares, as tenants in common, and not as joint tenants by entirety."

.It was said in *Thacker v. Thacker*, 125 Ind. 489: "As has often been said, suretyship is a fact collateral to the contract, and arises out of the equities existing between the parties. The test by which to determine the true relation of a married woman to a contract in which she has become a joint promisor with others, is not what relation she agreed to occupy, but what she received, or what she was to receive, in consideration of her promise. If, in fact, she neither received nor contracted for any benefit, but signed upon a consideration

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the benefit of which was received by one of the joint promisors, then no matter that she may have agreed to be bound as principal, the law assigns to her the status of a surety, and she will not be bound unless she has in some way estopped herself from setting up the facts. *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213." See also *Orr v. White*, 106 Ind. 341; *Voreis v. Nussbaum*, 131 Ind. 267.

If a married woman who receives no benefit from a contract, cannot, except by estoppel, bind herself as principal, it seems clear enough that she cannot, as here, bind herself as joint principal.

There is no doubt, of course, that by representing that the contract is for her own benefit, or that the money or other advantage secured thereby is to be for herself, or for her estate, a married woman may, as any other person, in case reliance is placed upon her statements, be estopped from denying the truth of such representations. Representations held to create such estoppel are set out in the case of *Tombler v. Reitz*, 134 Ind. 9.

Other cases are referred to in the brief of appellee.

In *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301, it was said that, where a married woman "represents, by sworn statement, that a contract is for her own benefit, and induces another to act in good faith on such statement, she is estopped, under the act of 1881 (section 6962, R. S. 1894; section 5117, R. S. 1881), to aver that the contract was one of suretyship."

In *Rogers v. Union Cent. Life Ins. Co.*, 111 Ind. 343, the court said: "The facts pleaded show that the appellee was informed by Mrs. Rogers that the money she sought to obtain was for her own benefit; that she was not undertaking as the surety of her husband; that the appellee believed her statements, and, relying on

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their truth, loaned her the money she desired ; and they show, also, that the appellee rightfully relied on her representations." And, referring to *Ward v. Berkshire Life Ins. Co.*, *supra*, the court added: "We did not hold in that case that the form or recitals of the contract will work an estoppel, nor do we so hold in this. What we hold is, that by her conduct and representations, relied upon by one who contracted with her in good faith, she is estopped to deny the character of her contract."

So, in *Lane v. Schlemmer*, 114 Ind. 296, also relied upon by appellee, the facts, as detailed in the opinion, were: "The note and mortgage were executed for personal property sold to the appellant. She made and delivered to the appellee's endorser an affidavit stating that she executed the note and mortgage to pay for the property she proposed to buy of him ; he relied on this affidavit, and her representations that she was the purchaser of the property, and that the note and mortgage were executed for her sole use and benefit, and not as the surety of her husband. The endorsee of the appellee believed the facts to be true, had no knowledge to the contrary, and relied entirely on the appellant's representations."

These cases, so far from showing that the appellant in the case at bar is estopped from denying that she signed the notes and mortgage as surety for her husband, plainly indicate, when applied to the facts in the record, that she made no representations such as the law deems sufficient to work an estoppel.

Patton's contract was solely with the husband. Personal security was at first agreed upon. That failing, the joint purchase plan, with notes and mortgage to be executed by the wife, was substituted. The wife was not consulted in either case.

Cole v. Temple.

After the bargain was made and possession surrendered by Patton, the husband went to Paoli and procured his wife's signature to the notes and mortgage. Patton never saw her or spoke to her about the matter. It is not pretended that Patton's testimony as to his conversation with Dr. Cole was competent to prove that he was agent for his wife in the transaction, or that the husband's representations could thus be imputed to the wife. Agency cannot be established by the statements of the alleged agent, but must be shown by some act, word or conduct of the principal. *Coburn v. Stephens*, 137 Ind. 683; *Metzger v. Huntington, Tr.*, 139 Ind. 501.

Apart from this testimony of Patton's, however, there is no evidence of any representations made by appellant as to any interest accruing to her from the contracts made by her husband. The recitals in the mortgage are plainly insufficient for such purpose. Indeed, all the facts clearly show that she had nothing to do with the sale, except to sign the notes and mortgage at the request of her husband. She made no representations whatever; and Patton, so far from relying on any representations of hers, completed the bargain, received the cash payment and placed Dr. Cole in possession of the drug store, before the appellant had any knowledge of the trade or had signed the notes or mortgage.

The judgment is reversed, with instructions to sustain the motion for a new trial.

Filed November 7, 1895.

Forsythe *et al.* v. The City of Hammond.

No. 17,275.

FORSYTHE ET AL. v. THE CITY OF HAMMOND.

MUNICIPAL CORPORATION.—*City.—Annexation of Territory.—Lands Not Adjacent.*—A statute giving a city council jurisdiction to annex adjacent lands on the written consent of the owners gives the council no jurisdiction to annex lands on the petition of owners whose lands are not adjacent. (See note at end of opinion.)

SAME.—*City.—Annexation of Territory.—Legislative Character.—Judicial Examination.*—The legislative character of the function of annexation of territory to a city does not preclude judicial examination and decision on questions as to the preliminary steps and the truth and sufficiency of the petition for annexation.

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142 505
169 375

From the Porter Circuit Court.

W. H. H. Miller, F. Winter, J. B. Elam, A. L. Jones, J. W. Youche and T. J. Merrifield, for appellants.

E. D. Crumpacker, P. Crumpacker and G. Crumpacker, for appellee.

HOWARD, J.—This was a proceeding before the board of commissioners of Lake county to annex certain unplatted territory to the city of Hammond. The board decided against the petition for annexation, and the city appealed to the circuit court of Lake county, from which a change of venue was taken to Porter county, where a special judge was appointed to try the cause. The case was heard by the Hon. W. B. Biddle, special judge, and a jury; and the trial resulted in a verdict and judgment in favor of the city and her petition for annexation.

The appellee contends that this appeal should be dismissed for the reason that all the persons against whom the judgment was rendered have not been made party

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appellants. To this contention appellants answer, that all such defendants, not made appellants, save one, did, within one year after the judgment was rendered, file in this court their written declination to join in the appeal; and that, by proof also filed, it is further shown that said defendant not made a party appellant and not joining in the written refusal to appeal, was, also within the year after judgment, notified of this appeal; asking also that said defendant be now made a party appellant.

In this condition of the record, we are of opinion, that, while the appeal has been brought with some irregularity of procedure, yet the spirit of the statute regarding the taking of appeals, and also the requirements of our rules and decisions in relation to the same matter, have been practically observed.

The purpose of the statute (section 647, R. S. 1894; section 635, R. S. 1881) was to provide that a part of those against whom a joint judgment was rendered might appeal, without compelling the remaining judgment defendants to appeal, and yet give all an opportunity to join in the appeal, so that but one appeal might be taken in one case. Notice is consequently provided to be given to those not joining in the appeal. If, however, such parties come voluntarily before this court and decline to join in the appeal, it would seem that as to them all is accomplished that was intended by the statute. As to the party served with notice of the appeal, we think the conclusion must be the same; for it is shown that he might have joined in the appeal had he so chosen.

So far as the interests of the appellee are concerned, the year allowed for an appeal having passed, there can be no appeal but this one; consequently the decision of this court, when made, will leave the appellee's rights fully and finally determined. The appellee, therefore,

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has no interest, personal to herself, in asking for the dismissal of the appeal.

It thus appears that no one, on either side, who was a party to the judgment has suffered the loss of any right or interest to which he was entitled; and hence no reason remains for the dismissal of the appeal. The case of *Gregory v. Smith*, 139 Ind. 48, and other cases cited by counsel are not in conflict with this conclusion. There, all the parties were not before the court; here, they are before the court, or have refused to come. The reason for the rule there insisted upon does not exist in this case, and hence the rule itself does not apply.

The appellants' first contention is, that the complaint or petition is insufficient, in that it does not show that the owners of the property sought to be annexed to the city had not given their consent to such annexation previous to the bringing of the proceedings before the commissioners. This objection is brought here for the first time; there was no demurrer or motion to make more specific urged to the complaint in the trial court.

The statute providing for the annexation of unplatted lands to a city by proceedings before the county board (section 3659, R. S. 1894; section 3196, R. S. 1881) does not require that it shall be stated in the petition that the owners will not consent to annexation. The want of such consent is implied in the very nature of the proceeding; if there were consent such a proceeding would be quite unnecessary, for the city might then annex the land by a simple resolution, as provided in the same section of the statute.

In the case of *Huff v. City of Lafayette*, 108 Ind. 14, although the question was not directly before the court, the opinion was expressed that it is not essential that the petition should contain a statement that the land-owners

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had not consented to annexation. Virtually a like conclusion as to what should be stated in the petition was reached in the recent case of *Chandler v. City of Kokomo*, 137 Ind. 295. Nor, as we think, are the cases cited by counsel for appellants in conflict with this conclusion.

In truth, there are but two methods provided for the annexation of lands to cities, one being with the consent of the owners, and one without such consent. If the land is platted, and the plat is recorded by the owner, the law implies a consent and agreement on his part that the land may be taken into the city. If the land is not platted, or the plat not recorded, the owner may file his written consent with the city council, agreeing that the land may be annexed. But, in either of these cases the city is also a party to the transaction, and may accept or refuse to accept the land as a part of the corporate territory.

But in case the property-owner does not consent to annexation, that is, does not make and put on record a plat of his land, or does not file with the city his written agreement that the land may be annexed, while at the same time the city desires such annexation, then the law provides a method by which the controversy may be tried and settled; and the board of county commissioners is set up as the tribunal before which, subject to appeal, the dispute between the parties may be determined. Sections 3659, 3660, 4224, R. S. 1894 (sections 3196, 3197, 3243, R. S. 1881); *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *City of Logansport v. La Rose*, 99 Ind. 117.

If, however, the property-owner had consented to annexation, there would be no dispute, no controversy, and hence no action before the county board. The law will not presume so vain a thing as that it might be supposed that, though there was consent on the part of the

property-owner, and though, consequently, the city might have annexed the land by a simple resolution, yet the corporation proceeded to ask the county board, by an adverse proceeding, to do for her what, without delay and without opposition, she might do for herself. The very existence of the controversy, therefore, shows not only desire for annexation on the part of the city, but also want of consent thereto on the part of the property-owner.

It is next contended, that because certain parts of the territory to be annexed are platted, therefore the commissioners had no jurisdiction to act on the petition. In order that any land, platted or unplatted, should be annexed to a city, it is necessary that the land to be annexed should be contiguous to the city limits; that is, that it should actually touch the existing territory of the city. In an action before the board for annexation, this contiguous territory must be unplatted; or, at least, if platted, the plat must, as yet, be unrecorded. However, should there be, within the limits of the territory to be annexed, certain tracts, called "platted lots," not contiguous to the city limits, and hence not recorded, certainly neither the statute, nor any good reason, would render such circumstance a cause for defeating annexation by the county board. The mere fact of platting, taken by itself, is rather a circumstance looking to annexation. It is an attempt to impress upon the territory an urban character, and is, in so far, an expression of consent to annexation. It would need only, in addition, as we have seen, that the lots should be contiguous to the city, and that the plat should be recorded, to enable the city to make the annexation without the action of the board. In other words, the reasons in favor of annexing such attempted plats of lots are

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greater than those in favor of annexing unplatted lands themselves.

But are such subdivisions of land, as are here referred to, legal plats, or plats, such as are contemplated in the statutes? We do not think so. A plat of a town or city, or a plat of land adjoining a town or city, may be acknowledged and recorded, in the same manner as a deed. (Sections 4411 and 4413, R. S. 1894; sections 3374 and 3376, R. S. 1881). It is such "lots laid off and platted, adjoining such city," that are contemplated in annexation proceedings, and referred to in sections 3658, 3659, R. S. 1894 (sections 3195, 3196, R. S. 1881). There is no provision for placing any other plats on record; and the recording of any other lots, or plats of lots, would be a nullity. *Taylor v. City of Ft. Wayne*, 47 Ind. 274.

The fact, therefore, that certain parts of the territory proposed to be annexed to the appellee city in this proceeding, are said to be platted lots, not contiguous to the city, can have no bearing on the result. Such lots are included in the unplatted lands, and can be annexed to the city only as a part of such unplatted lands. Indeed, we may go further: even if the whole tract sought to be annexed were platted, but the plat not recorded, the common council would have no authority to annex the land without the consent of the owners; and the county board alone could take jurisdiction.

It may be observed, in addition, that the petition for annexation in this case, and also the published notice, describe the territory to be annexed by metes and bounds only, and no mention is made of lots; but a description of lands by metes and bounds is a description of the lands as unplatted.

The evidence also shows that the lands were in fact unplatted. It is only on the map filed that we notice

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on a part of the territory not contiguous to the city, the outlines of platted lands; but there is no evidence of any attempt at placing such plats on record. These tracts are entitled on the map as subdivisions of parts of certain named sections of land, according to the United States surveys. The principal of these divisions is styled, "Roby and Shedd's Addition to Chicago in Indiana." It is hardly necessary to say that there cannot be a legal addition to Chicago in Indiana; and that none of these subdivisions are platted lots as contemplated in our statutes. *Taylor v. City of Ft. Wayne, supra.*

The whole territory to be annexed, then, is clearly to be regarded as unplatted land. The attempts at platting parts of the territory not contiguous to the city, as shown on the map filed for inspection by the county commissioners, could be considered only for the purpose of enabling the board to discover the probable fitness or unfitness of the lands for city uses and purposes. The case of *Chandler v. City of Kokomo, supra*, cited by appellants in this connection, had reference to lands contiguous to the city, and not to attempted plats not contiguous, and hence is not here in point. Contiguous recorded plats may be annexed directly by the city; all other lands are to be regarded as unplatted, and will be treated accordingly in annexation proceedings.

In *City of Logansport v. La Rose*, already cited, in considering section 3660, R. S. 1894 (section 3197, R. S. 1881), this court said: "Provision is made for the annexation to the city of contiguous territory, whether platted into lots or otherwise, without the consent of the owners thereof, upon petition of the common council to the board of commissioners of the county."

In commenting on this decision, counsel say that the clause, "Whether platted into lots or otherwise," is

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wholly misleading, and contend that it is not warranted by the statute; that the statute provides that only unplatted land may be annexed by action of the county board.

We are of opinion, however, that the learned judge who spoke for the court in that case intended by the words "platted into lots" to speak of an unrecorded plat of lots. The common council, without the consent of the owners, has no authority to annex contiguous unrecorded platted lots, but only those the plats of which are placed on record; and if there should be plats made of lands contiguous to a city, but the plats were kept off the record, it would be only by petition to the commissioners that the city could procure the annexation of such lots. In other words, for the purposes of annexation, such lots must, as we have already said, be treated as unplatted lands. And if this is true of a contiguous unrecorded plat, as is the force of what Judge Howk said in *City of Logansport v. La Rose, supra*, still more must it be true of noncontiguous plats, which, as we have seen, not only are not recorded, but for whose record the statute makes no provision. They must be treated as a part of the unplatted contiguous territory, and hence fall solely within the jurisdiction of the county board.

It is next contended that the third instruction given by the court to the jury is erroneous. The material part of the instructions complained of is as follows:

"It is required that the proceedings should conform strictly to the statutory requirements, and the petition and other documentary evidence have been introduced to prove the regularity of the proceedings; but as no question is raised before you of any want of compliance with the statutory requirements, or that of the contiguity of the territory sought to be annexed, you may find that the proceedings were regular, and that the

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territory is contiguous to the corporate limits of the city of Hammond."

As the record does show that all the proceedings taken by the city were in conformity with the statute, and that this fact was in no way questioned, and as both parties, and all the evidence, documentary and oral, including the plats filed, showed that the territory sought to be annexed was contiguous to the city of Hammond, there could be no error on the part of the court in assuming the existence of such undisputed facts. *Carver v. Carver*, 97 Ind. 497; *Board, etc., v. Legg, Admr.*, 110 Ind. 479.

But it is not the contiguity of the territory to be annexed that is disputed by counsel, but whether a part of that territory, lying next to the city of Hammond, had not already been annexed to the city of East Chicago before the petition for annexation had been presented by the city of Hammond to the county board. This is not a question as to whether the territory sought to be annexed was contiguous to the city of Hammond, or whether the proceedings for that purpose were regular, but, rather, whether the annexation could take place for another reason, namely, that the part next to Hammond had been already annexed to East Chicago. However the latter question might be determined, it would not affect the correctness of the instruction, which related only to the regularity of the proceedings and to the contiguity of the lands sought to be annexed. These last questions being undisputed, the instruction was correct.

As to whether a part of the territory sought to be annexed to Hammond had already been annexed to East Chicago, and could not, therefore, be annexed to Hammond, which is the real question here made, the facts presented, and which were all shown by docu-

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mentary evidence, were as follows: After the common council of the city of Hammond had resolved to present their petition for annexation to the board of county commissioners, and after they had given the statutory notice of their intention to present such petition, describing in the notice the lands sought to be annexed, but before the petition was presented to the board, the city of East Chicago, on the written consent of the owners, annexed by resolution to that city a strip of land eighty rods wide on that part of the lands next to Hammond which the latter city sought to annex. The effect of this annexation to East Chicago, if valid, would be to defeat the Hammond petition; for if the strip was annexed to East Chicago, it could not also be annexed to Hammond; and as the strip covered all the land in the territory sought to be annexed which was contiguous to the city limits of Hammond, there would be nothing left to annex to that city, for the contiguity of the remaining territory sought to be annexed would be cut off by the East Chicago strip.

The evidence as to the East Chicago annexation proceedings is all documentary, and it is without conflict. The legal sufficiency of this evidence was, therefore, a question of law for the court; and if such evidence shows that the action before the East Chicago common council was ineffectual for the annexation of the strip in question, the court might so inform the jury, and the instruction would not be erroneous for that reason. *American Ins. Co., etc., v. Butler*, 70 Ind. 1.

The strip of land proposed to be annexed by East Chicago was unplatted. It was, therefore, necessary, as we have already seen, that a written consent should be filed for its annexation by the owners of the land. Such a written consent was filed by the Calumet Canal and Improvement company, one of the appellants, and

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owner of the greater part of the land to be so annexed to East Chicago, including the whole of the eighty rod strip contiguous to Hammond. If this strip reached the limits of East Chicago, so that its east end should be contiguous to the limits of that city, there would be no doubt that the written consent of the Improvement company and the resolution of the common council of East Chicago would have effected the desired annexation. But prior to this time the Improvement company had, by valid deeds, conveyed to the Chicago & Calumet Terminal Railway company strips of land which, taken together, entirely cut off the eighty rod strip from the corporate limits of East Chicago. The railway company did not file any written consent to the annexation of its strip of land to East Chicago. It follows, therefore, that the owners of all the land sought to be annexed to East Chicago not having filed their written consent to its annexation, the common council never acquired jurisdiction, and such annexation has not taken place. The proceedings before the common council being a nullity, they may be attacked even collaterally, except, perhaps, in case of estoppel, of which there is no question here. *City of Indianapolis v. McAvoy*, 86 Ind. 587; *Strosser v. City of Ft. Wayne*, 100 Ind. 443; *City of Delphi v. Startzman*, 104 Ind. 343; *City of Indianapolis v. Patterson*, 112 Ind. 344.

While all presumptions will be indulged in favor of the regularity of proceedings before an inferior tribunal when once jurisdiction is shown, yet if it appears that facts essential to jurisdiction are wholly wanting, the presumptions in favor of the action of the tribunal must cease. *Board, etc., v. Markle*, 46 Ind. 96; *Wilkinson v. Moore*, 79 Ind. 397; *Smith v. Clausmeier*, 136 Ind. 105. (43 Am. St. R. 311); *Clayborn v. Tompkins*, 141 Ind. 19.

Some other questions are discussed by counsel, but we

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think that in what we have said we have passed upon all questions affecting the merits of the case. Finding no available error, the judgment is affirmed.

Filed April 11, 1895.

NOTE.—The power of the Legislature to annex territory to municipalities is considered at length in a note to *State, ex rel. Richards, v. Cincinnati* (Ohio), 27 L. R. A. 737.

ON PETITION FOR REHEARING.

HOWARD, C. J.—One of the positions taken by counsel in support of their petition for a rehearing of this case is, that the circuit court had no jurisdiction of the appeal from the board of county commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial function, and, as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises.

The proposition so advanced was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but as it is a question that affects the jurisdiction of the trial court, as also of this court, it is one that will be entertained at any time.

It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board.

It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the reasons why, in the opinion of the council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed

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to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true, and are sufficient, seem to be questions calling for a judicial examination and decision.

In a similar case, *Grusenmeyer v. City of Logansport*, 76 Ind. 549, it was said by Woods, J., speaking for this court, that "The decision of the board, in such a case, is judicial, and not merely administrative or legislative."

But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the Legislature may, as it has done in this case, provide for an appeal to the courts, to determine whether the city council, and the county board have complied with the statutory requirements in the action taken.

It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and of the court is to determine whether the conditions so prescribed by the law have been complied with. The Legislature has expressly provided for such judicial determination by the board, and for an appeal therefrom to the courts; and this court has frequently recognized the right to such appeal. Section 4224, R. S. 1894 (section 3243, R. S. 1881). *Catterlin v. City of Frankfort*, 87 Ind. 45; *Chandler v. City of Kokomo*, 137 Ind. 295; *Wilcox v. City of Tipton*, 42 N. E. Rep. 614; see also *Windfall, etc., Co. v. Emery*, 142 Ind. 456; and see *City of Wahoo v. Dickinson*, 23 Neb. 426.

Indeed, by thus expressly providing for an appeal to the courts in annexation proceedings, the Legislature has indicated its will that the courts should supervise the proceedings, to the end that the annexation shall be carried into effect as the law directs.

In *Forsythe v. City of Hammond*, 142 Ind. 505 (68

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Fed. Rep. 774), Baker, J., in passing upon an application made to the United States Circuit Court for the district of Indiana, by one of the appellants in the case at bar, to enjoin the appellee from collecting taxes upon the lands annexed in this proceeding, speaking of the question now under consideration, said: "The power to hear and determine whether the conditions prescribed by law for the creation, enlargement or contraction of a municipal body exist, is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement or contraction of a municipal body is not the act of the court, but is the act and result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body, or the enlargement or contraction of its limits; and, when these conditions are judicially ascertained, the law, *ex proprio vigore*, creates the municipal body, or enlarges or contracts its boundaries."

Counsel next repeat the contention that the action of the common council of East Chicago, in attempting to annex to that city certain of the lands here in controversy, without first having secured the assent of the owners of that part thereof adjacent to the city, cannot be attacked collaterally in this case. We cited in the original opinion numerous authorities to the proposition, that the jurisdiction of an inferior tribunal, as a common council, may be attacked collaterally, and evidence offered to show that the tribunal did not have jurisdiction of the subject-matter or of the parties. We have attentively read the acute analysis made of those authorities by counsel, and are still satisfied that the authorities so cited do establish the truth of the proposition stated.

We are inclined to think that counsel have not carefully distinguished between facts as to the jurisdiction

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of a body, and facts as to the proceedings and acts of that body after jurisdiction is shown. If there is jurisdiction, then the decision that follows is conclusive, except on direct attack. But jurisdiction itself may always be inquired into; and it is only after jurisdiction is established, both of the subject-matter and of the person, that the decision of the tribunal will be invulnerable to collateral attack. As said by this court in *Board, etc., v. Markle*, cited in the original opinion, "The facts which it is said must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be enquired into collaterally, are such as, in the absence of which, the court cannot rightfully hear and determine any question touching the matter in controversy. Hence, a recital in the record of such facts may be shown to be false." See also *State, ex rel., v. Hudson*, 37 Ind. 198. As bearing upon the question, see further, *Rape v. Heaton*, 9 Wis. 301 (76 Am. Dec. 269); *Thompson v. Whitman*, 18 Wall. 457; *Withers v. Patterson*, 27 Tex. 491 (86 Am. D. 643); *Scott v. McNeal*, 154 U. S. 34; *Works, Courts and their Jurisdiction*, sections 20, 23, 25, 26.

In the case at bar, it is not doubted that the owners of the lands adjacent to the city of East Chicago, and which it was attempted to annex to the city, had never assented to such annexation, but that the only petition for annexation presented to the common council was by owners of lands not adjacent to the city; yet the claim is made that the question of the right of the council to annex such adjacent lands, and also the nonadjacent lands, is foreclosed by the record. The city council assumed that the petitioners for annexation were the owners of the lands adjacent to the city, and it is said that this assumption is conclusive, although, in fact, the owners of adjacent lands did not assent to such

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annexation. If that contention were good, why could not any person go before a city council, claiming falsely to be the owner of adjacent lands, and petition for their annexation to the city; and if the record of the common council should show that upon such petition the lands were annexed, how could the decision be collaterally called in question? The law, however, gives the council jurisdiction to annex adjacent lands only, on the written assent of the owners. It is clear that the common council had no jurisdiction of the subject-matter.

In cases cited in the original opinion, we think it is shown that this court has more than once decided practically the same question here raised; namely, that attempts at annexation of lands to cities made by common councils not having jurisdiction, are void, and may be attacked collaterally as well as directly. *City of Indianapolis v. McAvoy*, 86 Ind. 587; *City of Delphi v. Startzman*, 104 Ind. 343; *City of Indianapolis v. Patterson*, 112 Ind. 344.

Counsel devote much argument and research to show that where the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and settle by its decision, such decision, in general, is conclusive. It needed but a statement of that proposition to establish its truth. But it does not follow that such tribunal by merely claiming jurisdiction can establish it.

If the law fixes what is necessary to acquire jurisdiction, the tribunal cannot take jurisdiction not so authorized by law.

The law requires notice to parties who are to be subject to the decisions of the tribunal. Jurisdiction, therefore, cannot be taken without such notice. But as the tribunal must itself decide whether the notice is sufficient

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its decision on such sufficiency is conclusive.

So when a petition is to be filed, such petition is necessary to give jurisdiction; and the tribunal by finding that a petition was filed, when in fact it was not, could not take jurisdiction. But as the tribunal is the only body to pass upon the sufficiency of the petition, whether it is in proper form, has the requisite number of signers, and whether the persons signing have the proper qualifications, etc., its decision on such questions is final.

Stoddard v. Johnson, 75 Ind. 20, one of the leading cases on this subject, and relied upon by counsel, is in harmony with this holding. That case decides that the presentation of a petition for the improvement of a highway gave the county commissioners jurisdiction over the subject-matter of the petition, and that whether the petition was in all respects sufficient was a jurisdictional question which the board had a right to decide for itself. The court, however, is careful to say that it is not to be understood as holding that "any petition, however defective or irrelevant, will be deemed sufficient to invoke the jurisdiction of the commissioners to decide upon its sufficiency and to impart validity to that decision as against collateral attack."

The correct rule is stated in the same case: "That once the jurisdiction of an inferior tribunal is established over the subject-matter of, and the parties to, a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevail in favor of the action of the courts of general powers."

Had the common council in the case before us, acquired jurisdiction over the lands to be annexed and lying adjacent to the city, and had it also acquired jurisdiction over the owners of such lands, then the subsequent proceedings, however defective, would not be void. But

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not having acquired jurisdiction over the lands or over its owners, the annexation proceedings were a nullity.

Whether the right of way of the Chicago Calumet Terminal Railway company was a fee simple or an easement is not material here. If the strips of land belonging to that company, by whatever name the title may be called, are not within the corporate limits of the city of East Chicago, it is very certain that the land of the petitioner company, and which is separated by those strips from the city limits, is not adjacent to the city. But it cannot rightfully be claimed that these strips are within the limits of the city of East Chicago. They were never annexed, either on petition of their owners or by act of the county board. The city could not levy taxes or street and sewer assessments upon these strips of land, could not make streets or alleys across them, or in fact exercise any jurisdiction whatever over them. The strips are outside the limits of the city, and completely separate the lands of the Improvement company from the city limits. How then could the city annex those nonadjacent lands of the Improvement company? The statute expressly provides that the lands to be annexed to a city shall be adjacent. Had the city jurisdiction of the subject-matter? Could the city by declaring the lands of the Improvement company to be adjacent make them adjacent? If the common council could annex lands separated from the corporate limits by a right of way one hundred feet across, why might it not annex lands a mile distant from the city? The conclusion is irresistible that the city had no jurisdiction of the subject-matter; the lands of the petitioner company were not adjacent to the city, and could not therefore be annexed.

The petition for a rehearing is overruled.

Filed November 8, 1895.

Stephens *et al.* v. Kaga.

No. 17,683.

STEPHENS ET AL. v. KAGA.

RECEIVER.—*To Harvest and Sell Crops.—New Trial as of Right.—*

Ejectment.—A receiver to harvest and sell crops will not be appointed pending the statutory new trial in an ejectment action, as the undertaking to pay all costs and damages which shall be recovered in the action, required by section 1076, R. S. 1894, as a condition of a new trial, affords an adequate remedy at law if damages for conversion of the crops would be recoverable in the action, and, if not recoverable, the remedy would be improper.

PRACTICE.—*Motion.—Procedure.*—A mover, under a notice of a motion to be made at chambers on a day and hour specified, or as soon thereafter as counsel can be heard, must proceed within such reasonable time after the time fixed in the notice and within the convenience of the judge as will enable his adversary to be present and be heard without attending through protracted periods of delay and uncertainty.

From the Harrison Circuit Court.

C. W. Cook and W. Ridley, for appellants.

N. R. Peckinpaugh and H. M. Peckinpaugh, for appellee.

HACKNEY, J.—This appeal is from an order by the judge of the circuit court, entered in vacation, appointing a receiver to take charge of, harvest and sell the crops growing upon certain lands in the possession of the appellants.

The petition upon which such appointment was made, alleged that the appellee, the petitioner, had theretofore become the purchaser of, and had received a deed for, said lands, upon a sale under a decree of foreclosure of mortgage; that he had instituted, and prosecuted to judgment, an action against the appellants in ejectment;

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that the appellants had, in said ejectment action, obtained a new trial as a matter of right; that said crops had been sown and had matured after the appellee had become the purchaser of said lands; that the appellants were insolvent, and had no defense to said ejectment action, but were delaying a trial thereof to enable them to gather and convert to their own use said crops, which they were then about to do, to the appellee's damage, in the sum of three hundred dollars.

On the 13th day of June, 1895, the appellants were personally served with notice that the appellee would, "on the 20th day of June, 1895, at 10 o'clock A. M., or as soon thereafter as counsel could be heard," apply to the judge of said court, in chambers, for the appointment of a receiver, the notice being accompanied by a copy of the petition. On the 21st day of June, 1895, the application not having been heard on the 20th, because of the absence of the judge the said petition was presented to, and heard by, said judge, over the written objection of the appellants, that no jurisdiction existed to entertain such petition on that day, without further notice to the appellants.

On such hearing the facts alleged in the petition were established by affidavits, and by the proceedings and papers in said ejectment action, which included a bond executed by appellants with surety, for the payment of all costs and damages to be recovered against them in said action.

The appellants claim error in the rulings of the lower court, in two respects: (1) In assuming jurisdiction to appoint a receiver upon a day subsequent to the day of which notice was given, of the application in vacation, for such appointment; and (2) that it appeared, inferentially from the petition, and directly from the evidence, that the appellee had an adequate remedy at law,

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for any losses to be sustained in the conversion of crops, upon the bond of appellants so executed in the ejectment suit.

(1) Notice in proceedings of the character here involved cannot be given, with reference to the time of the proposed hearing, with that certainty that is possible with reference to stated terms of court, prescribed by law and continuing through definite periods, and which litigants are presumed to attend, and to observe the course of proceeding throughout such periods. Here, the return time of the notice must involve uncertainty, and admit of reasonable variation to meet the varying demands upon the time of the judge who is to hear the application. Of course, there should be no rule enabling a litigant to give notice to his adversary, of a hearing at a particular time, and then to so delay his application and to so present it, as to require the adversary to stand guard constantly at the place of hearing, to avoid an advantage being taken of his interests. The correct rule, we think, is that which requires the moving party to proceed within such reasonable time after the time fixed in the notice, and within the convenience of the judge, as will enable his adversary to be present and be heard, without the unreasonable burden of attending through protracted periods of delays and uncertainty. If he so delays in presenting his application, as to cast such burden upon his adversary, he should be deemed to have waived his right to proceed under the notice given, and to have assumed the duty of giving another notice. Here, the delay was but for a day, and that from no fault of the moving party, but because of the engagements of the judge, which prevented him from being present at the time specified in the notice. This delay was not unreasonable, and did not deprive the appellants of an opportunity to be present, nor require of

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them a burdensome attention to the movements of the appellee in seeking the judge and presenting the application. In this conclusion we have left out of view the fact that on the 20th day of June telegrams passed between appellee's counsel and the judge, from which it was learned that the proceeding would be heard the next day, and that counsel, who represented the appellants in the ejectment action, to which said application was auxiliary, were shown the telegrams, and thereby received a knowledge of the course of the proceeding, which enabled them, on the next day, to be present, as they were, and to have been heard with every preparation made for a hearing on the day previous. We conclude, therefore, that the appellee acted upon his notice with reasonable promptness, and with the utmost fairness to the appellants and their legitimate interests.

(2) The appointment of a receiver to gather and sell the crops, if appellants succeed in the ejectment action, will deprive them of their property rights in such crops and will substitute therefor a claim against the receivership for such balance of the proceeds of sale as may remain after the payment of the expenses of harvesting and marketing, and the costs of receivership, including receiver's fees, attorneys' fees, court costs, etc. Such rights should not be so embarrassed and its value diminished unless it may be made to appear clearly that if the appellee shall ultimately succeed in the principal action, he will, should a receiver be denied, suffer the loss of a like property right in such crops with no prompt, efficient and adequate remedy for the recovery of the value to him of such crops. On the one hand, it is claimed that, though appellants may be insolvent and may intend to convert the crops, the bond which they gave in the principal case takes the place of their solvency and makes

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good any claim which the appellee may be entitled to enforce against them for the conversion of such crops. On the other side, it is urged that the bond cannot be held to cover liabilities arising subsequent to its execution and not involved in the issue at the time of its execution and that the appellee is not required to suffer the conversion but is entitled to the specific property rather than to a recovery of damages. In the absence of the bond, if appellants were insolvent, we think there could be no reasonable doubt but that a receiver should have been appointed, if the pleadings were so framed as to present the question of damages. R. S. 1894, section 1236; *Bitting v. Ten Eyck*, 85 Ind. 357; *Galloway v. Campbell*, 142 Ind. 324. It is asserted on behalf of the appellants and is conceded for the appellee, that equity will not permit the appointment of a receiver in any case where the party applying has a clear and effective legal remedy for such damages as he alleges he will sustain by the failure to appoint such receiver. Of this proposition there can be no doubt. It then remains to determine whether such remedy existed in favor of the appellee. Under the former rule (2 G. & H. 252, section 601), a new trial as a matter of right was allowed to the unsuccessful party in an ejectment suit "upon the payment of all costs, and of the damages, if the court so directed." By the present rule (R. S. 1894, section 1076), the new trial is given "on the applicant giving an undertaking, with surety to be approved by the court or clerk, that he will pay all costs and damages which shall be recovered against him in the action." It is manifest that under the old rule, where the damages to the successful party have materially increased upon the second trial, injustice would result from the payment only of the costs of the first trial and, if the court so

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held, the damages first assessed. By the present rule no such injustice is possible. The increased costs and damages are secured by the bond and cannot be affected by the insolvency of the party. We may properly presume that the rule was changed for the purpose of attaining this just end. If, therefore, the conversion of the crops by the appellants between the first and the second trials had the effect to increase the appellee's recoverable damages, if successful on the second trial, such damages were secured by the bond without regard to the solvency of the appellants. If, however, such conversion would not admit of a recovery by the appellee, in case of the successful termination of his action it would seem to follow, as a necessary conclusion, that a receiver should not be allowed.

The appointment was sought, as we have shown, as a remedy auxiliary to the main action, and upon the theory of a right of recovery in such action for the conversion of the crops. If no such recovery were possible the remedy would be improper, and, if possible, the bond would give security against the insolvency of the appellants. Counsel for appellee suggest that their client would not be required to stand by and suffer the sale of his crops, but is entitled to such remedy as will secure to him the identical property rather than a recovery in damages. The theory of his application for the appointment was, not to secure to him or to his adversaries the identical property, but to cause the conversion of the property into cash, to be held to await the final disposition of the principal cause.

A court of equity regarding sacredly the rights of both parties would have the same duty to protect the party in possession of the crops in his right to the identical property as to protect the party out of possession in such rights.

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We conclude, therefore, that, even if, in the absence of a bond, a receiver could properly have been appointed, no such right existed in this case. The order of the judge, appointing such receiver, is reversed with instructions to deny the appellee's petition.

Filed November 8, 1895.

No. 16,487.

GILLENWATERS v. CAMPBELL.

INFANT.—*Sale of Real Estate.*—*Disaffirmance.*—*Restoring Purchase Price.*—An infant need not, under sections 3364–3365, R. S. 1894 (sections 2944–2945, R. S. 1881), on disaffirming a sale of his real estate, on attaining his majority, restore or tender the purchase price of the premises received by him, unless at the time of the sale he falsely represented himself to have attained his majority. (See note at end of opinion.)

SAME.—*A Personal Privilege.*—*Rule as To.*—*Assignment.*—*Contract.*—The rule that infancy is a personal privilege, and not assignable to the privy for the avoidance of contracts, applies only to privity of estate; a privy in blood may avoid the voidable contract of an infant or insane person,

PLEADING.—*Set-off.*—*Damages for Detention of Real Estate.*—*Quieting Title.*—Possession of the premises in question, with damages for the detention thereof, may be counterclaimed under section 853, R. S. 1894 (section 350, R. S. 1881), as “arising out of or connected with the cause of action,” in an action to quiet title to real property, where the defendant denies title in the plaintiff and alleges ownership in himself.

SAME.—*Complaint.*—*Demurrer.*—*Misjoinder of Causes.*—A demurrer will not lie to a complaint on the ground “that several causes of action have been improperly joined,” simply because one of the several paragraphs of one cause of action asks for relief which could not be granted in a cause of action which could be properly joined, where the several paragraphs taken together allege a cause of action which could be properly joined, and ask appropriate relief thereunder.

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From the Grant Circuit Court.

M. H. Kidd, N. G. Hunter and J. W. Arthur, for appellants.

G. A. Henry, P. H. Elliott and W. H. Charles, for appellee.

HACKNEY, J.—The appellee sued the appellant, with Leonard Gillenwaters, Sr., and Ivy Gillenwaters, seeking to quiet his title to a described 82.24 acres of land in Me-shin-go-me-sea's reservation in Grant county. The complaint alleged that on January 6th, 1888, Jane Gillenwaters, then the wife of Hugh Gillenwaters, an adult, was the owner in fee simple of said lands, and sold the same to Campbell for the sum of \$3,280, paid to her; that she was then a minor, but attained her majority on the 12th day of March, 1890; that on said 6th day of January, 1888, she and her said husband joined in a deed of general warranty conveying said lands in fee simple to said Campbell. It was further alleged that said Hugh died October 8th, 1888; that said Jane intermarried with Leonard Gillenwaters, Sr., on the 25th day of March, 1889, and thereafter, on the 12th day of April, 1890, died intestate, leaving, as her only heirs at law, her said husband, Leonard Gillenwaters, Sr., Leonard Gillenwaters, the appellant, and Ivy Gillenwaters, her two children; that said conveyance had never been disaffirmed, and said purchase money had never been tendered back, but that said named heirs were claiming some interest in the land, against which claim it was prayed appellee's title should be quieted. The defendants answered in denial, the appellant and Ivy Gillenwaters by guardian *ad litem*. Upon a trial by the court there was a finding and judgment for the appellee. A motion for a new trial, as a

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matter of right, was filed on behalf of the appellant and Ivy Gillenwaters, which motion was sustained, but subsequently, upon the announcement of the death of said Ivy, it was ordered that the record show the granting of said motion only as to this appellant.

It appears, therefore, at this point, that the interest, if any, of Leonard, Sr., and Ivy Gillenwaters, as the heirs of Jane Gillenwaters, was foreclosed by said judgment, and, upon the new trial, left to be determined only such interest as descended to the appellant in the event that said deed should be avoided.

At this point in the proceeding the appellant filed a cross-complaint, in three paragraphs, making the appellee and Leonard Gillenwaters, Sr., defendants thereto. The third paragraph, being thereafter dismissed, need not be further noticed. Leonard Gillenwaters, Sr., did not appear to the cross-complaint, was not served with process thereon, and no steps further were taken by or as to him. The appellee's demurrer for want of facts, and for the improper joinder of causes of action, was sustained to the first paragraph, and a demurrer for want of sufficient facts was sustained to second paragraph of cross-complaint.

Upon the second trial there was a finding and judgment for the appellee over appellant's motion for a new trial. The assigned errors here urged are :

1. "The court erred in rendering judgment for appellee, for the reason that the complaint of appellee does not state facts sufficient to constitute a cause of action.

2. "Sustaining the demurrer to the first paragraph of cross-complaint.

3. "Sustaining the demurrer to the second paragraph of cross-complaint.

4. "Overruling the motion for a new trial."

The first assignment, it will be observed, is addressed not to the sufficiency of the complaint, but to the action

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of the trial court in rendering judgment. Under this assignment counsel attack the sufficiency of the complaint. We do not stop to inquire whether this method of attack should be recognized under our practice, nor do we consider the questions made upon the complaint, since the same questions arise upon the action of the trial court in sustaining the demurrers to the cross-complaint.

The first paragraph of cross-complaint alleged generally that the appellant was the owner in fee simple of the undivided one-half of said lands; that he was entitled to the immediate possession thereof; that Campbell then held, and for more than one year held, without right, the possession of said lands, and unlawfully kept appellant therefrom to his damage in a sum stated; that the mesne profits of said land during said period were five hundred dollars; that Gillenwaters, Sr., was asserting an adverse claim of title to the lands, and it was prayed that appellant be given possession and damages, and that his title be quieted against said Gillenwaters, Sr.

As to the appellee, it is manifest that the facts so pleaded do not constitute a cause for quieting title; indeed, no such relief was sought against him, but, plainly, the cause so pleaded is for possession as to an undivided one-half and damages for detention and mesne profits. The statutory cause of demurrer, "that several causes of action have been improperly joined," applies to the whole complaint, and not to one of several paragraphs. *Fletcher v. Piatt*, 7 Blackf. 522; *Bougher v. Scobey*, 16 Ind. 151. The demurrer we are considering could not, therefore, have been properly sustained for misjoinder of causes.

The only proposition advanced by the appellee in support of this ruling of the lower court is that the appellant

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had also pleaded an answer in general denial under which the statute, R. S. 1894, Sec. 1067, permitted "every defense to the action * * * either legal or equitable." The pleading in review was not simply a defense; it sought affirmative relief, and was, so far as it related to damages, in the nature of a counterclaim. Counterclaim is not a defense. *Stotsenburg v. Fordice*, 142 Ind. 490. So far as it alleged an ownership in the appellant, the pleading was but the equivalent of the general denial, but that allegation was a part of the theory that appellant could recover possession and damages from the appellee, and was not intended as a mere negative of the appellee's allegation of title in himself. Tested as a cross-demand for possession and damages, it must be determined whether the relief demanded "is any matter arising out of or connected with the cause of action," as required by the code (R. S. 1894, section 353), for, as said in *Standley v. Northwestern, etc., Life Ins. Co.*, 95 Ind. 254, "There must be some legal or equitable connection between the matters pleaded as a counterclaim and the matters alleged in the original complaint." The matters pleaded "might be the subject of an action in favor of the" appellant, but could not properly be considered as tending "to reduce the plaintiff's claim." The question returns therefore: are the matters pleaded "connected with the cause of action" alleged in the complaint? They relate to the same land, they depend upon the ownership, by the plaintiff or the defendant, of the land. The cause of action pleaded in the complaint and that alleged in the first paragraph of cross-complaint have such intimate legal connection as permitted them to have been united in one action, if such causes concurred in the same person. R. S. 1894, section 279. It is the policy of the law that, when litigation must be resorted to for the adjustment of disputed

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rights, every question logically connected with such disputed rights shall be determined and put at rest in one action. We conclude, therefore, that the appellant might properly demand at least the possession of the land, the title to which was put in issue by the complaint. If he had sought, in this paragraph, to quiet his title as against the appellee, he certainly would have been permitted, in connection with that demand, to seek possession and damages. Instead of a prayer to quiet title he alleged his ownership and demanded possession and damages. This, we think, he had a right to do.

The facts pleaded in the second paragraph of cross-complaint were substantially the same as those pleaded in the complaint, except that it was alleged that Hugh Gillenwaters, at the date of the execution of the deed to Campbell, was under the age of twenty-one years. This difference, it is claimed by the appellant, rendered the deed to Campbell void and not merely voidable. It is now the thoroughly established rule that the executed contracts of minors are voidable and not void. The following are some of the decisions of this court to that effect: *Fetrow v. Wiseman*, 40 Ind. 148; *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *Sims v. Bardoner*, 86 Ind. 87; *Buchanan v. Hubbard*, 119 Ind. 187; *McClanahan v. Williams*, 136 Ind. 30; *Ashmead v. Reynolds*, 127 Ind. 441. The same rule has been adopted with reference to the executory contracts of minors in regard to personal property, and as to the conveyances of insane persons, whose insanity was not office found when the deed was executed. *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van Court*, 100 Ind. 113; *Musselman v. Cravens*, 47 Ind. 1; *Richardson v. Pate*, 93 Ind. 423; *Schuff v. Ransom*, 79 Ind. 458; *Hardenbrook v. Sherwood*, 72 Ind. 403;

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Freed v. Brown, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Somers v. Pumphrey*, 24 Ind. 231. It is true, as appellant's counsel suggest, that by statute infants are forbidden to alien their lands. R. S. 1894, section 3330 (R. S. 1881, section 2917). It is also true, however, that "The joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife." R. S. 1894, section 3340 (R. S. 1881, section 2921). With these statutes in existence, and, doubtless, construing them together, the rule that the deeds of infant married women are voidable has been evolved. The solemn character of the instrument of conveyance and the essential rule that unchallenged records of title import verity require that absolute invalidity shall not attach to such instruments, while the welfare of the minor requires that they may be avoided, if seasonable opportunity be accepted, and if not the repose of titles demands an estoppel. There is no express limitation upon the effects of the joint deed of the husband and wife, so far as the infancy of the husband is concerned, and, if there were, we presume the rule that such conveyance is voidable and not void would obtain for every reason that those are so held where the wife is a minor.

This paragraph of cross-complaint does not allege a return of the purchase price of the lands, and objection is made that infancy is a personal privilege and does not survive to privies in blood nor to privies in estate, and, therefore, that when Jane Gillenwaters died, never having disaffirmed her deed, no right existed in the appellant to assert the infancy of his mother in avoidance of her deed. That a return of the purchase money is essential to a disaffirmance is claimed under the provisions of sections 3364-3365, R. S. 1894 (sections 2944-2945, R. S. 1881). By the first of these sec-

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tions, where the conveyance is "by an infant *feme covert* of lands belonging to her, and in which sale and conveyance her husband has joined, *he being of full age*," restoration of the purchase money is required. It was alleged that Hugh Gillenwaters was not of full age when he joined his infant wife in her conveyance. Whether the reasons for a distinction between the cases where the husband is over and where he is under his majority, are valid, is a legislative question. We find that the distinction is made. By the second of the sections above referred to restoration is necessary in all sales of real estate by an infant who disaffirms "if said infant falsely represented himself * * to be" over twenty-one years of age. The facts pleaded in the cross-complaint do not disclose any such representation. An answer to the third paragraph of cross-complaint alleged that the husband, Hugh, falsely misrepresented his age, but that answer went out by the dismissal of that paragraph of cross-complaint.

That privies in blood may avoid the voidable contracts of infants and persons of unsound mind has been frequently held and recognized in this State. As to infants, see *Harbison v. Lemon*, 3 Blackf. 51; *Law v. Long*, *supra*; *Price v. Jennings*, 62 Ind. 111; see also, 1 Devlin Deeds, section 875; 10 Am. and Eng. Ency. of Law, pp. 637, 638. As to *non compotes*, see *Northwestern, etc., Ins. Co. v. Blankenship*, 94 Ind. 535; *Somers v. Pumphrey*, *supra*, and cases cited in each. It is the rule also, that privies in estate may avail themselves of the disability of infancy or insanity of the principal, where such principal has theretofore, or does concurrently with the plea of the privy, disaffirm and avoid his contract. The rule that infancy is a personal privilege, and is not effective for the avoidance of

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contracts, applies to those cases where advantage is sought by one who is but a privy in estate. See *Pitcher v. Laycock*, 7 Ind. 398; *Price v. Jennings*, *supra*; *Shrock v. Crowl*, 83 Ind. 243; *Borum v. Fouts*, 15 Ind. 50; *Wright v. Bundy*, 11 Ind. 398; *Harris v. Ross*, 112 Ind. 314.

We conclude, therefore, that the second paragraph of cross-complaint was not subject to any of the objections urged against it.

There is much discussion upon the weight and sufficiency of the evidence, and in some instances as to its admissibility. Upon the question of estoppel against the appellant, because of false representations by Hugh Gillenwaters, as to his age, it is sufficient to say that no such question is in the case. As to the sufficiency of the evidence upon any of the questions discussed, no opinion need be given since another trial, upon the theory essential under our conclusions, will probably avoid all such questions.

The judgment of the circuit court is reversed, with instructions to overrule the appellee's demurrer to the appellant's first and second paragraphs of cross-complaint.

Filed November 19, 1895.

NOTE.—The necessity of returning the consideration in order to disaffirm infant's contracts is discussed with a review of the numerous authorities in a note to *Englehart v. Prichett* (Neb.), 26 L. R. A. 177.

No. 17,489.

WESTFIELD GAS AND MILLING CO. v. MENDENHALL ET AL.

INJUNCTION.—*Gas Company.—Use of Streets for Pipes.—Ordinance.*
—*Maximum Price of Gas.*—A gas company which uses the streets of a town for laying its pipes under general permission therefor contained in an ordinance under section 4306, R. S. 1894, limiting the price to consumers to a certain maximum, will be enjoined from charging a consumer more than such maximum.

From the Hamilton Circuit Court.

T. J. Kane and R. K. Kane, for appellant.

L. S. Baldwin and J. F. Neal, for appellees.

JORDAN, J.—Appellees by their action sought to enjoin the appellant from carrying out its purpose to deprive them of the use of natural gas from the plant of the appellant, upon the ground that the former had refused to pay a price therefor in excess of the maximum rate fixed by an ordinance of the board of trustees of the town of Westfield, Indiana, under which ordinance appellant exercised the right to use the streets of said town in the construction and operation of its natural gas plant. Appellant unsuccessfully demurred to the complaint, and upon its refusal to further plead, a judgment was rendered awarding the relief asked by appellees.

The only question presented by this appeal is as to the alleged error of the court in overruling the demurrer to the complaint. The following, we believe, is a correct resume of the material facts as they are alleged in the complaint:

“1. That the appellees are citizens of the town of Westfield, in Hamilton county, Indiana, and patrons

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and consumers of appellant's Gas Company, and consumers of natural gas furnished by said appellant in said town.

“2. That defendant is a corporation duly organized and operating under the laws of said State, and having its office and principal place of business at said town, and was organized for the purpose of owning, controlling and operating gas wells, and also a gas plant in said town, to supply natural gas for light and fuel to residents and citizens of said town, and is now engaged in said business, and has been so engaged since, and pursuant to an ordinance passed by the board of trustees of said town, etc.

“3. That said town of Westfield is a municipal corporation, duly organized and existing under the laws of the State of Indiana.

“4. That on the 4th day of January, 1889, the board of trustees of said town duly and legally passed an ordinance regulating the supply of natural gas to the citizens of said town.

“5. That said ordinance was duly published in the *Westfield News*, a newspaper printed and published in said town, on the 11th day of January, 1889, and became of effect on the 2nd day of January of said year; that a copy of said ordinance is filed herewith, and marked ‘Exhibit A.’

“6. That among other things said ordinance fixed and established a maximum schedule that should be charged to consumers for the supply of said gas, which schedule and the prices authorized to be charged for kitchen and cook stove are as follows, to-wit: Eighty cents per month for twelve months; \$9.60 per year.

“7. That said ordinance further provided that before any corporation, firm, individual or company desiring to pipe the town of Westfield, Indiana, for the supply

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of natural gas, shall do any work toward the laying of any mains or pipes in any street, alley or public grounds thereof, such individual, corporation or firm, as the case may be, shall, if the board of trustees so elect, execute a bond to the town of Westfield, Indiana, in the penal sum of \$3,000.00 to the acceptance of, and the approval of said board, in which one or more of the sureties shall reside in Hamilton county, Indiana; that afterwards, on the 4th day of February, 1889, the defendant, desiring to occupy said streets and alleys with its pipes did, at the request of said trustees, file its written acceptance of said ordinance and bond, as in said ordinance required, which said bond and acceptance the board of trustees approved.

“8. That said board of trustees approved and accepted said bond, and that said defendant laid its pipes and mains in the streets and alleys of said town, all of which was done subject to the filing and acceptance of said bond, and in pursuance of said ordinance.

“9. That it was further agreed between said company, and between said board of trustees before the filing and acceptance of said bond, that in consideration of said town waiving its rights by law to require defendant to pay a license fee for the privilege of occupying and using said streets, alleys and grounds aforesaid, and operating said plant therein, said defendant would furnish said gas to consumers in said town in accordance with the schedule of rates and prices fixed by said ordinance.

“10. That on the 20th day of April, 1894, defendant published in the *Westfield News*, notice to gas consumers, as follows, to-wit:

“NOTICE TO GAS CONSUMERS.

“Notice is hereby given that all persons using gas

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from the Westfield Gas and Milling Company, whose five year contract expires on or before May 1, 1894, will be charged on and after that date, \$1 per month per cook stove, instead of 80 cents as heretofore.

W. B. HILL, *Secretary.* A. L. BINFORD, *President.*

“11. That the defendant has been giving out in speeches that he intends to raise the rates for the use of gas in kitchen and cook stoves, and that the stoves referred to by defendant are kitchen stoves on which the contract has expired or is about to expire, all of which would be in violation of said ordinance.

“12. That plaintiffs have, since the adoption of said ordinance and the execution and approval of said bond, fitted up and plumbed their respective dwelling houses and kitchen and cook stoves at great expense to them for the use of said gas, by which said stoves have been rendered unfit for any other kind of fuel; that plaintiffs desire to continue the use of said gas for their kitchen stoves, and have always been ready and willing to pay said rate as fixed by said schedule, but defendant refuses to accept said rate, and threatens to exact from said plaintiffs and other consumers, the sum of one dollar per month for each kitchen or cook stove, in violation of said ordinance, and will do so unless restrained by the order of this court. * * * A copy of the ordinance is filed with the complaint, and marked ‘Exhibit A.’”

There are other averments in the pleading, but it is not necessary to set them out, as the foregoing sufficiently present the particular point herein involved.

The ordinance in question was made a part of the complaint, and treated by the parties as an exhibit.

Sections one and six are substantially as follows:

By section one, the privilege or right is granted to any

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corporation, company, firm, etc., having its principal office in the town of Westfield, to lay and extend its gas pipes and mains upon and through the streets and public grounds of that town for the purpose of supplying it and its inhabitants with natural gas, under, and subject to the restrictions named in the ordinance.

. Section six provides that before any corporation or company, etc., shall lay any pipes or mains in the streets of the town, it shall execute a bond to the approval of the board of trustees, * * * and that any such company or corporation, etc., shall furnish gas to consumers under such rules and regulations as it shall adopt, at and for not exceeding the schedule of prices following, to-wit: Kitchen stoves, 80 cents per month, or \$9.60 per year. The schedule continues, fixing the maximum price to be charged consumers for the use of gas in heaters and grates, etc.

The contention of appellant is, that the town of Westfield had no power, by ordinance, to regulate the price of natural gas to consumers in this manner, and that appellant is not bound by the terms and conditions of this ordinance. While, upon the other hand, appellees deny this contention, and contend that the town had the power, under the law, to adopt this ordinance with these restrictions, and as appellant acquired its rights thereunder to the use of the streets of the town, by expressly accepting the same, and executing its bond as provided, it became bound by its terms and conditions; that the provision or stipulation to furnish gas to the consumers of the town at a price not to exceed that fixed in the ordinance, when agreed to by the appellant was in the nature of a contract between it and the town which inured to the benefit of any citizen thereof, who desired to obtain gas from the appellant, and that the same may be enforced by appellees.

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By an act of the Legislature, approved March 7, 1887 (Acts 1887, page 36), section 4303, R. S. 1894, incorporated towns and cities are empowered to enact a general ordinance to reasonably regulate the supply, distribution and consumption of natural gas within their respective corporate limits, and to require a fee of the persons or companies for the use of the streets granted to them by these municipalities.

It was held, in effect, by this court, in the appeal of *Citizens' Gas and Mining Co. v. Town of Elwood*, 114 Ind. 332, that such a general ordinance must allow all companies, corporations or persons to use the streets as near as practicable on equal terms and conditions; that the statute of 1887, at least impliedly, forbids the grant of special privileges by special contract or license to any one company, corporation or person to the exclusion of others.

The board of trustees of the town of Westfield seems to have been exercising the power lodged in it by the statute cited, and by the adoption of the ordinance in controversy extended to all persons similarly situated, upon equal terms and conditions, the benefit of the franchise thereby granted.

The town had the right in granting the use of its streets, to impose such reasonable requirements, terms, regulations and conditions therein, upon those accepting the privileges and benefits of the grant, as its own prudence and discretion might dictate, so as not to restrict, however, the town in its legitimate exercise of legislative powers. The authority to prescribe such terms and conditions, if not expressly conferred by the act of 1887, may at least be reasonably inferred therefrom, in order that the full force and effect may be given to the power expressly granted. *City of Crawfordsville v. Braden*, 130 Ind. 149 (14 L. R. A. 268); *City of Indianapolis*

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v. *Consumers' Gas Trust Co.*, 140 Ind. 107 (27 L. R. A. 514), and authorities there cited.

There was no compulsion upon the appellant to accept the rights upon the terms and conditions imposed under the ordinance; it did so, however, voluntarily and unreservedly. By executing the bond in question, and the written acceptance of the franchise, there was a clear manifestation of consent upon appellant's part, to accept the rights granted upon the terms and conditions proposed by the ordinance, and to be bound thereby. Having accepted the franchise granted by the ordinance, and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privileges under the grant, and so continuing to do, it is now precluded from successfully refusing to discharge its obligations to the inhabitants of the town, who desire to use its fuel upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance. The town could not, by its subsequent action, impair or restrict the rights granted to, accepted, and exercised by appellant. Neither will the latter be permitted, under the circumstances, to decline to comply with the terms or conditions assumed by which it is expressly obligated. *City of Indianapolis v. Consumers' Gas Trust Co.*, *supra*.

In the case cited the character, effect and rights acquired under a similar ordinance passed by the city of Indianapolis were considered, and that decision and the authorities therein cited support the conclusion reached in the present appeal. In the case at bar the fact also appears, that in consideration of the town waiving its right to exact the license fee, the appellant agreed to furnish gas to consumers in accordance with the prices fixed in the schedule.

The business of manufacturing and distributing gas

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for fuel and illuminating purposes, by means of pipe laid in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the State, which has been granted to an individual or corporation, under legislative authority through the action of such municipalities; the services rendered, and to be rendered for such a grant are of a public nature, and the grantee owes a duty to the public. *People, ex rel., v. Chicago Gas Trust Co.*, 130 Ill. 268 (8 L. R. A. 497), and authorities cited.

The privileges and rights to the streets of the town of Westfield were awarded to appellant, and it was, as it appears, exempted from the payment of a fee which the town, under the statute, was expressly authorized to exact for the grant in question. As a consideration for all this, appellant agreed to furnish gas to the inhabitants of the town at a price not to exceed the maximum rate fixed. This obligation it assumed, and bound itself to discharge, and this obligation the law will enforce, and appellant cannot successfully be heard in a court of justice to contend that it, under the circumstances, is of no binding force. Its learned counsel cite the case of *Lewisville, etc., Gas Co. v. State, ex rel., etc.*, 135 Ind. 49 (21 L. R. A. 734), and insist that this case is conclusive upon the questions herein involved. In this contention, however, they are clearly mistaken. In that case, as it appeared, the appellant, for some time prior to the adoption of the ordinance in controversy, had been engaged in furnishing natural gas to the citizens under a former grant to it by the trustees of that town. By a subsequent ordinance the board of trustees fixed a maximum rate to be charged in the future to consumers. The gas company did not accept any rights under this subsequent ordinance or agree to be bound by the prices therein fixed. This case is clearly distinguishable from the one now under

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consideration. It does not appear that the ordinance now in controversy impaired or changed any prior existing rights and privileges held or enjoyed by appellant herein.

There is no apparent error in the action of the court in overruling the demurrer to the complaint, and the judgment is therefore affirmed.

Filed November 19, 1895.

No. 17,589.

FOLAND v. THE TOWN OF FRANKTON ET AL.

MUNICIPAL CORPORATION.—*Town.—Lighting Expense.—Payable Out of General Fund.*—The expense of lighting a town may be paid out of the current revenues of the town, without making a special levy to provide funds for that purpose, even though the effect of such payment is to postpone judgment or other creditors of the town.

SAME.—*Town.—Lighting Contract.—Debt.—Statute Construed.*—A contract for lighting a town, the lights to be paid for annually as furnished, does not create a debt within the meaning of section 4877, R. S. 1894, requiring that an indebtedness shall not be incurred except on petition of a majority of the owners of the taxable real estate of the town. (See note at end of opinion.)

PLEADING.—*Complaint.—Injunction.—Town.—Contract for Lighting.*—An allegation in the complaint in an action to restrain a town from entering into a contract for lighting its streets, "that the town will not have money to meet its indebtedness when the same matures above the amounts necessary for the necessary running expenses of said town, and will not receive from the present levy sufficient funds to pay said indebtedness, and cannot make a levy in time to pay the same as it matures," is insufficient, as a mere conclusion.

From the Madison Circuit Court.

Diven & McMahan, for appellant.

J. M. Farlow and *Goodykoontz & Ballard*, for appellees.

142	546
142	554
142	604
142	546
144	184
146	470
142	546
156	404
142	546
160	43
142	546
161	438

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MONKS, J.—Appellant brought this action to enjoin appellees from entering into a certain contract for lighting the streets of said town. Appellees filed a demurrer to the complaint, which was sustained, and appellant refusing to plead further, judgment was rendered in favor of appellees.

The only error urged calls in question the action of the court in sustaining the demurrer to the complaint. So far as necessary to the determination of the questions presented, the complaint is as follows: "That the appellee is about to enter into a contract with the Frankton Natural Gas and Oil Company, by the terms of which the town agrees to pay three hundred dollars in one year for twenty-five street lights, and twelve dollars for each additional street light, and at the termination of each year thereafter, for five years, to pay said gas company the sum of three hundred dollars, and twelve dollars additional for each light over twenty-five, which contract, as intended to be made and entered into, is an absolute promise to pay said amounts at said times, and thereby creating an indebtedness against said town; that said town is now indebted in the sum of twenty-seven hundred and fifty dollars; that the board of trustees is proposing to create said indebtedness aforesaid, and that no petition has ever been signed by a majority of the resident owners of the taxable real estate of said town, to contract said debt for lighting the streets, or any debt; that said town has need of money, and will not have money to meet the said indebtedness, when the same matures, above amounts necessary for the actual running expenses of said town, and will not receive, from the present levy, sufficient funds to pay said indebtedness so created, and cannot make the levy in time to pay the same as it matures."

It is earnestly insisted by appellant that appellees, by

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said contract, would create an indebtedness, and that the same could not be incurred, unless a majority of the owners of taxable real estate of said town should petition the board of trustees to contract such debt, or loan, as provided by section 4377, R. S. 1894. Acts 1891, p. 389.

This question was, after a careful consideration, determined by this court, against the contention of appellant, in the case of *Crowder v. Town of Sullivan*, 128 Ind. 486 (13 L. R. A. 641). It was held in that case that where a municipal corporation contracts for a useful and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned.

In the case cited, this court said: "It may be true that the contract creates an obligation, for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous, for it is a matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and no one will incur the necessary expense for such machinery and appliances, if only short periods are allowed to be provided for by contract. The courts cannot presume that the Legislature meant to so cripple the municipalities of the State as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained. But it is unnecessary to discuss this point

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at greater length, for we regard the law upon it as settled by the adjudged cases. *City of Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 417, and authorities cited; *City of New Albany v. McCullough*, 127 Ind. 500; *City of East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415 [38 Am. Rep. 97]; *Appeal of City of Erie*, 91 Pa. St. 398; *Grant v. City of Davenport*, 36 Iowa 396; 1 Dillon Munic. Corp. (4 ed.), section 135." See also 44 Am. St. Rep., note on p. 240; *Laycock v. City of Baton Rouge*, 35 La. Ann. 475; 15 Am. and Eng. Ency. of Law, 1126. It is clear, from these authorities, that the execution of the contract in question would not create a debt within the meaning of section 4377, R. S. 1894, *supra*, and, therefore, no petition was necessary.

Appellees had full power to contract for gas, under the provisions of section 4301, R. S. 1894, Acts 1883, p. 85, for any period, not exceeding ten years.

The allegation in the complaint, "that the contract, as intended to be made and entered into, is an absolute and unconditional promise to pay, etc.," adds no strength to the complaint. Neither does the demurrer admit this statement to be true, as claimed by appellant. The court knows from the allegations concerning the terms of the proposed contract, that the three hundred dollars to be paid for gas, is to be paid at the end of each year, and that no debt is created within the meaning of section 4377, R. S. 1894, *supra*, until the compensation mentioned is earned. Appellant cannot, by an averment that the contract has a certain meaning, change the legal effect of the contract, as he has stated it in the complaint.

The allegation, "that said town will not have money to meet said indebtedness, when the same matures, above the amounts necessary for the actual running expenses of said town, and will not receive from the present levy sufficient funds to pay said indebtedness, and cannot

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make a levy in time to pay the same, as it matures, are mere conclusions, and present no question. The facts, if any there were, showing that the town will not have money to meet said indebtedness, or that it will, by the proposed contract, overreach its current revenues, should be stated, and not the mere conclusions of the pleader. *Gum Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158 (161), and cases cited.

The complaint in this case was filed February 19, 1894, and, under the existing law, it would seem that the board of trustees of the town could have made a levy of taxes in time to pay the installment under the proposed contract, depending, perhaps, the first year upon whether the same was collected by the marshal of the town, or the county treasurer.

The expense, however, of light, water, labor, and the like, is essential to the maintenance of corporate existence, and constitutes current expenses, payable out of the current revenues, which may be applied to such purposes, even though the effect is to postpone judgment, or other, creditors. *Gardner v. City of Valparaíso*, *supra*; *Town of Fowler v. F. C. Austin Mfg. Co.*, 5 Ind. App. 489; *Coy v. City Council*, 17 Iowa 1; *Coffin v. City Council*, 26 Iowa 515; *Laycock v. City of Baton Rouge*, *supra*.

There is no error in the record.

Judgment affirmed.

Filed November 19, 1895.

NOTE.—On the question what constitutes an indebtedness within the meaning of provisions restricting municipal debts, see an extensive note to *Beard v. Hopkinsville* (Ky.), 23 L. R. A. 402.

Seward v. The Town of Liberty.

No. 17,581.

SEWARD v. THE TOWN OF LIBERTY.

INJUNCTION.—*Contract for Lighting Streets of a Town.—Fraud.—Price.—Gas Company.*—A town will not be enjoined from making a contract for lighting its streets with gas on the ground of fraud, simply because the price to be paid is three times that paid by private consumers, where it does not appear that the gas plant was sufficient to furnish the necessary gas, or that it can be obtained elsewhere for a less amount, or that the gas to be furnished the town is of the same quality as that furnished to private consumers.

MUNICIPAL CORPORATION.—*Contract for Lighting Streets.—Debt.*—A contract for gas to light the streets of a town for a specified time does not create an indebtedness within the meaning of section 4377, R. S. 1894, prohibiting any incorporated town from incurring any debt without the presentation to the board of trustees of a petition.

From the Union Circuit Court

C. L. Seward, for appellant.

T. D. Evans, for appellee.

MONKS, J.—Appellant brought this action to enjoin appellee from contracting with Snyder & Coughlin to furnish gas to light the streets and public grounds of said town.

The complaint was in two paragraphs, to which a demurrer for want of facts was sustained, and appellant refusing to plead further, appellee had judgment.

It is alleged in the first paragraph “that appellee is about to enter into a contract to pay \$720.00 per year for sixty street lights, that is, \$12.00 per year for each light, being \$3.00 per thousand feet for the gas used, while private consumers are only paying \$1.00 per thousand feet for gas from the same company; that the market price of gas to all persons using said gas in

142	551
142	694
142	551
146	470
142	551
156	402
156	406
156	406
142	551
164	599
142	551
166	329

Seward v. The Town of Liberty.

said town is and has not been over \$1.00 per thousand feet; that the amount appellee is about to agree to pay is excessive, being three times more than the market price of said gas, and for that reason and in that respect, the proposed contract will be fraudulent and unfair, etc.”

The statute confers upon towns the authority to contract for the lighting of the streets, alleys and other public places with the electric or other forms of light, on such terms and for such times, not exceeding ten years, as may be agreed upon. Section 4301, R. S. 1894; Acts 1883, p. 85; *Crowder v. Town of Sullivan*, 128 Ind. 486, 488 (13 L. R. A. 647).

The power given by statute to municipal corporations to contract for gas is purely a business power and is discretionary. *City of Valparaiso v. Gardner*, 97 Ind. 1, 4, and cases cited; *Dillon Munic. Corp.* (4th ed.), section 473, and note; *Beach Public Corp.*, sections 555, 815.

It is settled law that discretionary powers vested by law in municipal corporations are not subject to judicial control, except in cases where fraud is shown or the discretion is being grossly abused to the oppression of the citizen. *City of Valparaiso v. Gardner, supra*; *City of Crawfordsville v. Braden*, 130 Ind. 149 (14 L. R. A. 268); *City of Richmond v. Davis*, 103 Ind. 449; *Robling v. Board, etc.*, 141 Ind. 522; *Kitchel v. Board, etc.*, 123 Ind. 540 (542), and cases cited; *Crow v. Board, etc.*, 118 Ind. 51; *Board, etc., v. Bunting*, 111 Ind. 143; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Madison v. Harbour Board of Baltimore*, 76 Md. 395, s. c. 25 Atl. 337; *Stevens v. St. Mary's Training School*, 144 Ills. 336 (18 L. R. A. 832) (36 Am. St. Rep. 438); *Whitney v. City of New Haven*, 58 Conn. 450; *Kendall*

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v. *Frey*, 74 Wis. 26; *Konrad v. Rogers*, 70 Wis. 492; 2 Am. St. Rep. on p. 93; 1 Dillon Munic. Corp. (4th ed.), section 94; 15 Am. and Eng. Ency. of Law, p. 1046, notes 3 and 4; 2 High Inj. (3rd ed.), sections 1240, 1246; 2 Beach Inj., section 1277.

Difference in opinion or judgment, however, is not sufficient reason for interference. High Inj., section 785.

The price to be paid for gas was within the discretion of the board of trustees of the town. The only allegation concerning fraud is that the price for which appellee is about to contract is three times what is paid by private consumers and that for that reason the proposed contract is fraudulent. There is no allegation that the gas plant may not have to be enlarged to furnish the gas provided for in the contract, or that the plant is of sufficient capacity to furnish the gas to light the town, or that any person or company will furnish the gas for less per year or per thousand feet, or that the gas to be furnished to the town under the proposed contract, is the same quality as that furnished to private consumers, or that the board of trustees or any one or more of them were about to enter into this contract from any improper or corrupt motives or influence.

One who charges fraud must plead all the facts constituting fraud; it is not sufficient to charge that a transaction is fraudulent. *Joest v. Williams, Admr.*, 42 Ind. 565 (568); *Curry v. Keyser*, 30 Ind. 214. Facts must be pleaded showing fraud, or that the discretion given by statute is grossly abused, to the oppression of the citizen.

The presumption is in favor of fair dealing; that the officers of appellee were acting in good faith and according to law; to be sufficient, therefore, the paragraph of complaint in question must contain such allegations as

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will overcome this presumption. Tested by these rules, the first paragraph of the complaint was not sufficient.

It is alleged in the second paragraph of the complaint that appellee is about to contract for gas to light the streets for four years for which the town will be required to pay \$2,880.00, "for the payment of which said town has no adequate funds." The proposed contract is assailed in this paragraph on the ground that it creates an indebtedness, within the meaning of section 4377, R. S. 1894; Acts 1891, p. 389, and that no petition has ever been presented to the board of trustees as required by that section. This court has held that such a contract does not create an indebtedness within the meaning of that section. *Crowder v. Town of Sullivan*, *supra*, and cases cited; *City of Valparaiso v. Gardner*, *supra*, and cases cited; *Foland v. Town of Frankton*, 142 Ind. 546; 2 Beach Pub. Corp., section 815; *Smith v. Inhab. of Dedham*, 144 Mass. 177; *Grant v. City of Davenport*, 36 Iowa, 396; *East St. Louis Gas Light Co. v. East St. Louis*, 45 Ill. App. 591; *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. Rep. 957; *Lott v. City of Waycross*, 84 Ga. 681; *Merrill R. W., etc., Co. v. City of Merrill*, 80 Wis. 358.

There was no error in sustaining the demurrer to each paragraph of the complaint.

Judgment affirmed.

Filed November 20, 1895.

Moore v. Harmon.

No. 17,559.

MOORE v. HARMON.

142	555
145	428

142	555
165	509

142	555
167	169

CONTRACT.—*Fraud Arising Out of Negotiations Leading Up To.—Merger.—Evidence.*—Fraud arising out of negotiations leading to the execution of a written contract is not merged therein, and evidence to prove the same is admissible, although it may vary, add to, or contradict its terms.

FRAUD.—*Real Estate.—Description.—Number of Acres (“More or Less”).—Sale.*—The qualification of a description in a land contract as to the number of acres sold by the words “more or less,” does not preclude the purchaser from recovering for fraud of the vendor in representing that the tract contained the number of acres specified.

PLEADING.—*Complaint.—Defect of Parties Plaintiff.—Waiver.—Plea in Abatement.*—A defect of parties plaintiff not apparent on the face of the complaint is waived, unless advantage is taken thereof by a plea in abatement.

SAME.—*Plea in Abatement, in Bar.—Verification.—Practice.*—An answer in abatement must be verified, and precede an answer in bar, and cannot be pleaded therewith, and the issues thereon must be tried first and separately.

SAME.—*Agreement that All Defenses Shall Be Competent Under General Denial.—Plea in Abatement.—Practice.—Defect of Parties Plaintiff.*—An agreement by the parties that the defendant may have all competent defenses under a general denial does not dispense with the necessity for a plea in abatement to make a defect of parties plaintiff not appearing on the face of the complaint available, as it will be construed to embrace only such defenses as are competent in bar, especially as under the code pleas in abatement cannot be joined with those in bar.

From the Howard Circuit Court.

S. E. Urmston and H. Warrum, for appellant.

J. M. Fippen and J. M. Purvis, for appellee.

JORDAN, J.—Appellee commenced this action in the Tipton Circuit Court to recover a money judgment against the appellant for the sum of \$868.00, and to

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enforce a vendor's lien upon certain described lands in Tipton county, Indiana, alleged to have been sold and conveyed by the former to the latter. The complaint is in three paragraphs.

The first is based upon the alleged facts that the land was sold to appellant for the price of \$7,200; that a certain named sum of the purchase-price had been paid, leaving a portion thereof due and unpaid.

The second alleges the sale, etc., and avers that the appellee accepted as part payment for the land sold by him a certain described tract of real estate in Greene county, Indiana, which was represented by appellant to contain one hundred and fifty-six (156) acres, when in truth and in fact, it was short some twenty-three (23) acres and over, and judgment is demanded for the alleged value of this deficiency and that a vendor's lien be declared.

The third is based upon the alleged fraud of the appellant, arising out of misrepresentations as to the number of acres in the Greene county tract. Issues were finally joined between the parties by a general denial and agreement: "That the defendant be permitted to have all competent defenses under the general denial."

Upon a change of venue the cause was tried in the Howard Circuit Court and a special verdict returned by the jury, and over a motion by appellant for judgment thereon in his favor and also his motion for a new trial, the court, upon the special finding of facts set forth in the verdict, adjudged the law to be with the appellee and rendered judgment accordingly for \$743.56 and decreed a lien as prayed for by appellee.

The only questions argued by appellant's counsel are those said to arise out of the third and fourth errors assigned.

The third is that "the court erred in overruling the

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motion by appellant for judgment on the special verdict."

The fourth error is based upon the action of the court in overruling the motion for a new trial.

The sole reasons presented and argued by the learned counsel for appellant, under the third assignment, are that appellant was entitled to a judgment on the verdict, because from the facts therein, it appeared that the Greene county land, which was a part of the consideration for the Tipton county tract owned by appellee at the time of the sale, was conveyed by appellant to appellee and wife, and it is insisted that therefore she had an interest in the subject of the action, and should have been joined as a co-plaintiff, as provided by section 262, R. S. 1881, and section 263, R. S. 1894.

We cannot consider this question as here presented, for the reason that it could not properly arise upon the motion for judgment in appellant's favor upon the special findings of the jury.

If Mary E. Harmon, wife of appellee, were a necessary party-plaintiff in the action as contended by appellant—a point which we do not decide—the omission to make her a party-plaintiff or defendant would result in a defect of parties; and if the fact that she was a necessary party by reason of her interest in the action and the relief sought to be obtained thereby, was not apparent upon the face of the complaint, then appellant would be compelled to interpose his objections by way of a plea in abatement, otherwise they would be deemed to be waived. *Bledsoe v. Irvin*, 35 Ind. 293; *Cleveland v. Vajen*, 76 Ind. 146; *Atkinson v. Mott*, 102 Ind. 431; *Talmage v. Bierhause*, 103 Ind. 270; *State, ex rel., v. Ruhlman*, 111 Ind. 17.

An answer in abatement must be verified and precede an answer in bar, and cannot be pleaded therewith, and

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the issue thereon must be tried first and separately. Section 365, R. S. 1881, section 368, R. S. 1894; *Watts v. Sweeney*, 127 Ind. 116.

It cannot be held that under the agreement mentioned, appellant might avail himself of the objections in question, as that agreement must be construed to embrace only such defenses as were competent in bar of the action; especially must this be so, for as we have seen, pleas in abatement are forbidden by the code to be joined with those in bar. It follows, therefore, that the question upon the point involved was not properly raised upon the motion for judgment on the verdict, and the court did not err in overruling the same.

Appellant strenuously insists that the court erred in overruling the motion for a new trial for the reason that the special finding of the jury is not sustained by the evidence.

We have carefully examined the evidence, and while it is true that there is a conflict therein to the extent that certain material facts are testified to by some witnesses and denied by others, nevertheless there is evidence sustaining the judgment, which the jury and trial court apparently considered credible.

The point is raised by appellant that, as the written contract for the sale, or exchange, of the lands contained the words "one hundred and fifty-six acres, more or less," referring to the Greene county land, therefore, the clause "more or less" was controlling as to the quantity of the land. But appellee testified upon the trial in the court below, that his attention was not called to this clause when he signed the contract, and that he was relying upon the express representations of appellant, to the effect that the tract contained one hundred and fifty-six acres. Where it appears by words of qualification, as "more or less," that the statement of the

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number of acres is a mere matter of description, and not of the essence of the contract, the buyer assumes the risk of the quantity, provided that there is no intermixture of fraud. *Tyler v. Anderson*, 106 Ind. 185, and authorities there cited.

The evidence, however, shows, and the jury so found, in effect, that the appellee was induced to enter into, and execute this contract for the sale of the land in question, through and by the fraudulent representations of appellant, leading up to said contract, consequently the clause "more or less" therein, under the facts, is not alone controlling, but it was a question for the jury, under all the circumstances and facts in the case, to determine whether or no the appellee assumed the risk as to the quantity of land in the Greene county tract. Fraud, arising out of the negotiations leading up to the execution of a written contract, is not merged therein; and when fraud is the issue, evidence tending to prove the same is admissible, although it may vary, add to, or contradict the terms of the written contract. The doctrine, therefore, of merger of all antecedent negotiations and representations, in such cases, has no application. *Johnson v. Miln*, 14 Wend. 195; *Hines v. Driver*, 72 Ind. 125, and authorities there cited; *Tyler v. Anderson*, *supra*.

Finding no available error, the judgment is affirmed.

Filed October 17, 1895; petition for rehearing overruled November 20, 1895.

Consumers' Oil Company v. Nunnemaker.

No. 17,850.

CONSUMERS' OIL COMPANY v. NUNNEMAKER.

CONTRACT.—*In Restraint of Trade.—Interdicted Territory, the Whole State Except One City.—Business, Selling Oil in One City.—Against Public Policy.*—A contract by which one engaged in selling oil in one city binds himself to refrain from carrying on his business in the whole State, with the exception of one other city, is unreasonable as in restraint of trade, and void and unenforcible even as to the city in which he had been engaged in the business.

From the Lake Circuit Court.

Olds & Griffin, for appellant.

JORDAN, J.—Appellant instituted this action to enjoin appellee from pursuing the business of selling oil and gasoline, and delivering the same to consumers, in the city of Hammond, Indiana. The action was commenced upon a written contract made and entered into by and between appellee and one H. T. Benham (who is described as “trustee and manager,”) on the 3d day of February, 1893. The complaint avers “that on and prior to said date the said defendant was the owner of one horse and one spring wagon and three tanks and harness, cans, and other utensils for use in his said business as hereinafter alleged, and was engaged in the business of a retail oil and gasoline merchant and in selling and delivering oil and gasoline to the citizens of the city of Hammond, in Lake county, Indiana, and in conducting his business he traveled through the streets of the said city of Hammond, calling upon residents of said city at their places of business and residences, and sold and delivered them oil at the places desired by them, for the use of said citizens ; that he had at that time

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established a trade in business in that line; that upon said date he entered into a written agreement with one Henry T. Benham, described in said contract as H. T. Benham, 'trustee and manager,' a copy of which is attached hereto and marked 'Exhibit A' and made a part hereof, by which contract the said defendant in consideration of three hundred dollars to him in hand paid by said Benham, the receipt of which was acknowledged, the said defendant sold, transferred and conveyed to the said Benham, his successors and assigns, all his right, title, and interest in and to his oil and gasoline business and plant, including the good will and reputation of said business, and all and singular the materials, chattels and personal property of every nature and kind whatsoever belonging to or in any way pertaining or used in or about said oil and gasoline business, among other things including one (1) horse, one (1) spring wagon, three (3) tanks, harness, cans, utensils, etc., consisting of everything used by the said defendant in his said business, and the said defendant further contracted and agreed with said Benham, his successors and assigns, that he, the defendant, would not, during the period of five years then next ensuing after the 4th day of February, 1893, do anything within the State of Indiana, outside of the city of Indianapolis, in the line of selling or delivering oil or gasoline to the houses of consumers by horse and wagon or otherwise, neither in his own behalf nor in his own name nor in connection with any partnership or corporation, nor as the agent of any person, partnership or corporation, nor in anywise do anything that would interfere with or compete with or work against the profit, advantage and business of the said Benham, as trustee and manager, or in any other name or style whatever, which he might assume or by which he might be known, or his successors or

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assigns, during the said period of five years. Said defendant further covenanting and agreeing in said contract that he would not during said period of five years, within said territory accept any employment directly or indirectly, nor receive, solicit or fill orders in any capacity whatsoever for any oil or gasoline to be sold direct to or delivered at the houses or places of business of consumers by wagon or other conveyances after the manner of the business hereinbefore described and carried on as aforesaid by the said defendant, as oil merchant and dealer, or as commission merchant or agent, and further agreed that he would not countenance, promote or encourage the business of any competitor of the said H. T. Benham, trustee and manager, or of his successors or assigns, within the territory aforesaid, during the said five years aforesaid; and further agreeing, stipulating and authorizing any court of law or equity to interpose its authority to compel the performance of said contract and to restrain any breach of the terms thereof."

It is further alleged that before the violation of the contract in question, Benham sold, assigned and transferred all of his right, title, and interest in and to the property so purchased to plaintiff, a corporation duly organized under the laws of the State of New Jersey, and also assigned and transferred the written contract and all right, title, interest and good will of said business in the territory aforesaid, to plaintiff. It further avers that the defendant has entered into and is pursuing his said business of selling and delivering oil to the consumers of said city of Hammond, in violation of his said contract and is threatening to so continue in violation of the rights of plaintiff, inasmuch as he comes in competition with plaintiff, who is engaged in the same business. Appellee's insolvency is also alleged,

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and a copy of the contract is filed with the complaint. An injunction is prayed to restrain the appellee from further pursuing his business in the city of Hammond.

A demurrer for insufficiency of facts was sustained to this complaint and this ruling of the court is assigned as error.

We are not favored with a brief upon appellee's part, but infer from statements in the brief of the learned counsel for appellant that the contract in controversy was assailed by the appellee upon the ground that it sought to prohibit him from selling and delivering oil at any place in the State of Indiana outside of the city of Indianapolis, and constituted an unreasonable restraint upon trade, and was, therefore, invalid and not enforceable in any respect.

Appellant contends that notwithstanding the territory is the entire State of Indiana, with the exception mentioned, in which appellee is restricted from pursuing his business as an oil merchant, the restraint is a reasonable limitation, and that the complaint based upon the contract in question set forth a sufficient cause of action for the relief thereby sought. It is settled that a contract in general restraint of trade is invalid, but one restraining a party from trading within reasonable limits so as not to be injurious to the interest of the public, is valid and may be enforced by an injunction, upon a proper showing of facts. *Beard v. Dennis*, 6 Ind. 200; *Duffy v. Shockey*, 11 Ind. 70; *Spicer v. Hoop*, 51 Ind. 365; *Baker v. Pottmeyer*, 75 Ind. 451; *Beatty v. Coble*, 142 Ind. 329.

The settled rule as enunciated by the American and English decisions of the highest courts seems to be that where, in the particular case before the court, the restraint in controversy, as to territory, appears to be broader or larger than is necessary to the protection of

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the party seeking to enforce the restrictive contract, it is of no benefit to either party, but in that event becomes oppressive upon the party against whom the enforcement is sought, and being oppressive the law regards the restriction as unreasonable and injurious to the interests of the public.

It is not the interests of the parties alone, which in the eye of the law are to be considered the true test, but in each particular case, under the facts, the judicial inquiry is: Will it be inimical to the public interest? If so, then, and in that event, the agreement must be held as hostile to public policy, and therefore void. Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. This principle owes its existence to the very sources from which the common law is supplied. *Greenhood Pub. Policy*, pages 2 and 3.

The law regards the good will of a particular trade or business as a species of property, possessing a market value, and subject to sale or disposal. But it is also a well established principle of law and public policy, that where a person is engaged in trading or other legitimate pursuits, he shall not be unreasonably fettered in the exercise of such business, and when he sells or disposes of the good will incident thereto, the law will only sustain such a restraint as to his future engagement in such business or pursuit, as will appear to be a reasonable space of interdicted territory, and what are such reasonable limits is a question of law for the court to determine under all the facts and circumstances in each particular case. In support of the several general propositions herein asserted, see *Wiley v. Baumgardner*, 97 Ind. 66, and authorities there cited; *Lawrence v. Kidder*, 10 Barb. 641; *Hubbard v. Miller*, 27 Mich. 15;

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Horner v. Graves, 7 Bing. 735 ; *Oregon Steam, etc., Co. v. Winsor*, 20 Wallace 64 ; *Taylor v. Blanchard*, 13 Allen, 370 ; *Dunlop v. Gregory*, 10 N. Y. 241 ; Greenhood Pub. Policy, Chap. VI, page 683 ; 3 Am. and Eng. Ency. of Law, 883, and authorities there cited ; 22 Am. Law Review, 873 to 889 ; *Mallan v. May*, 11 M. & W. 652.

In the case of *Dunlop v. Gregory*, *supra*, the court of appeals of New York said : "Contracts, upon whatever consideration made, which go to the total restraint of trade, * * anywhere in the State, are void. Such contracts are injurious to the public, and operate oppressively upon one party without being beneficial to the other. * * The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenantor must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business."

In the case of *Taylor v. Blanchard*, *supra*, it was held that an agreement not to set up, exercise or carry on the trade or business of manufacturing or selling shoe cutters at any place within the commonwealth of Massachusetts was void.

In the case of *Moore v. Bonnet*, 40 Cal. 251, a stipulation not to engage in a business of a particular kind in the county or city of San Francisco or State of California, was held to be void.

In *Lawrence v. Kidder*, *supra*, a covenant not to conduct the business of manufacturing or trading in palm leaf beds or mattresses in the State of New York, west of Albany, was held to be invalid.

In *Price v. Green*, 16 M. & W. 346, a contract not to carry on the perfume business within six hundred miles of London, was adjudged void.

In *Horner v. Graves*, *supra*, an agreement not to

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practice dentistry within a district two hundred miles in diameter was held to be void.

In *Beal v. Chase*, 31 Mich. 490, where it appeared that the obligor sold a printing establishment and the business thereof, which extended over the entire State, a covenant not to engage in the same business in that State so long as the vendee should continue in the business at the place of sale, under the circumstances, was held to be reasonable and valid.

In *Rousillon v. Rousillon*, reported in L. R. 14 Ch. Div. 351; 22 Alb. Law Jour. 212, the English court of chancery held that there is no "hard and fast" rule holding contracts of this character, unlimited as to space, void, but that the validity depends upon the reasonableness of the contract, and where it appears that the broad restriction is reasonably necessary for the full protection of the contractee, it will be sustained.

In a recent English decision in the appeal of *Nordenfelt v. Maxim, Nordenfelt, etc., Co.*, Law Reports (1894) App. Cases, 535, where a patentee and manufacturer of guns and ammunition for war purposes, transferred his patent to a company, and covenanted with the latter not to engage in that business for a term of twenty-five years, it was held that owing to the nature of the business, and the limited number of customers to whom sales might be made (confined mainly to governments of countries), that the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injurious to the public interest.

These decisions serve to illustrate the manner in which the courts, under varied circumstances, have been, and are, inclined to view such contracts. The rule in question, in its application by the courts, in later decisions, to an extent, seems to have been modified, and is made to yield, in some respects, to the nature or

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character of the particular trade or business, and the territory over which it extends at the time of the sale of the good will.

Cases do, and will arise, as for instance in *Beal v. Chase, supra*, and *Nordenfelt v. Maxim, Nordenfelt, etc., Co., supra*, where the particular business has been built up so as to extend over an entire district or State, and sometimes beyond, or where, from its nature, the number of those who patronize it are comparatively of a limited number, and where, consequently, broad or enlarged restrictions are considered as reasonably necessary for the desired protection, and are, therefore, sustained.

Viewed, then, in the light of the authorities cited herein, how stands the case at bar? It appears, and is conceded by appellant, that the particular business or trade in which appellee was engaged at the time he sold out, and executed the contract in controversy, was confined to the limits of the city of Hammond. There is no contention that it extended to any other parts of the State, beyond these limits. Neither from the nature of the business nor otherwise does it appear that it was necessary for the protection of appellant that the appellee should be prohibited from engaging therein at any and all places in the State, other than the city of Indianapolis. It is a matter of general knowledge that there are numerous consumers of oil for fuel and illuminating purposes in this great and growing State, and it is manifestly to their interest that there should be competition in the selling of the same, at least, that the price thereof may be reasonable. The enlarged covenant of restraint as to territory, it is obvious, was unnecessary under the circumstances. It could serve no purpose except as a tendency towards the monopoly of the business. If appellant could buy out appellee and

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restrict him in this manner, it might proceed to do so to every other person in the whole State engaged in a similar business, and eventually reduce the sale of oils in the State to comparatively few hands, or possibly to its own absolute control, and thus virtually stifle legitimate competition. The law has always been hostile to the creation of monopolies when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good, is void on the ground of public policy. This policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance prices to the injury of the public in general. *Cent. Ohio Salt Company v. Guthrie*, 35 Ohio St. 666; *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (8 L. R. A. 497).

Appellant apparently insists that the contract may at least be held enforceable against appellee in the city of Hammond, and cite *Peltz v. Eichele*, 62 Mo. 171. In that case the agreement was not to enter into the manufacture of matches in the city of St. Louis, or any other place, for five years. The stipulation as to St. Louis was sustained upon the ground that it was reasonable, and could be separated from the other clause. It is a recognized principle that when a contract is or can be so separated in parts as to constitute two agreements, one illegal and the other legal, the latter may be enforced and the transaction *pro tanto* sustained. But it is otherwise where the contract in its nature is not divisible. *Board, etc., v. Dennis, supra*; *Wiley v. Baumgardner, supra*.

The contract before us is not of this character, and does not come within the provisions of the rule stated, and it must either stand or fall as an entirety. The

The State, *ex rel.* Eagy, Trustee, etc., v. Mills *et al.*

restraint of the trade or business as therein stipulated as to territory, under the circumstances, was manifestly too large, and is, therefore, in violation of the principles of public policy to which we have referred, and consequently void, and cannot in any respect be enforced.

Judgment affirmed.

Filed November 21, 1895.

No. 17,651.

THE STATE, EX REL. EAGY, TRUSTEE, ETC., v.
MILLS ET AL.

142	569
142	408
142	569
147	236

TOWNSHIP TRUSTEE.—*Liability of Township for Office Rent.*—*Township of Less than 25,000 Inhabitants.*—A township trustee has no power, under section 8083, R. S. 1894 (section 6008, R. S. 1881), requiring trustees of townships of less than 25,000 inhabitants to set apart for the transaction of the township business such days of the week or month as such business might require, to bind the township for the rent of an office in which to conduct such business.

From the Randolph Circuit Court.

J. A. Shockney and T. Shockney, for appellant.

E. L. Watson and S. A. Canada, for appellees.

HACKNEY, J.—This proceeding was by the appellant to require, by the writ of mandamus, that the appellees, the Board of Commissioners of Randolph county, approve and allow the report of the relator, as trustee of Wayne township, in said county, in which report he presented vouchers and asked allowances for moneys paid as and for rentals for an office in which to conduct the business of said township. There are some technical questions as to the sufficiency of the petition and of

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the appellant's right, if the claims are valid, to maintain the proceeding, but our conclusion upon the prime question, the validity of the claims, renders it unnecessary for us to pass upon such questions. That there should be a discretion lodged somewhere to permit township trustees to rent office rooms and to make their trust funds liable therefor, seems to us important. Many of the trustees in this State have large populations over which to exercise the duties of their offices, and some are occupied constantly in the discharge of those duties. Others have small populations and their duties occupy but a small fraction of their time. That all should incur the expense of an office room is as unreasonable as that some should be without such room. Hence we say that a discretion should be permitted in the matter. That it should be permitted does not establish its existence, and its existence is the all important question upon the issue before us. It is not claimed by counsel that an express authority exists to incur a liability for any such purpose, but that it exists by implication, is claimed from the nature of the duties of the office and the fact that the Legislature has seen fit to compensate trustees with a *per diem* of but two dollars for each day necessarily employed. This compensation, it is said, does not justify an expenditure by the trustees for office rentals. Any rule on the subject must be general, so far as the right may exist by implication, and to say that every trustee has business enough to justify the renting of an office is unreasonable. Nor can we find the implication from any distinction within the class who are paid a *per diem*, between those of much and those of little business, which authorizes even those having the most business to incur, on behalf of their trust, an indebtedness for such purpose. If we may imply a legislative intention on the

The State, *ex rel.* Eagy, Trustee, etc., *v.* Mills *et al.*

subject, from the enactments concerning the duties and salary of the office, it must be that it was intended that if an office room became necessary it should be paid for from the salary. Trustees are now classified so that those in townships whose population is more than one hundred thousand shall receive twenty-five hundred dollars as an annual salary for all services. R. S. 1894, section 8084. Those in townships whose population is over seventy-five thousand receive eighteen hundred dollars per annum, and those in townships having over twenty-five thousand and less than seventy-five thousand population receive not less than one thousand dollars nor more than fifteen hundred dollars. Such trustees are required to keep their offices open each day in the year, excepting Sundays, etc. R. S. 1894, section 8085. The townships not included within these special provisions are paid a *per diem*, as we have shown.

This classification suggests the intention of the Legislature to select from the whole number those whose population and business, within the judgment of the Legislature, justify the maintaining of office rooms and to provide a salary sufficient to enable them to pay rentals. Whether it was intended to require that office rentals should be paid from salaries by these special classes, is not necessary for us to decide, but we must conclude that the discretion necessary to a classification, as we have shown, has not been intrusted to another, but to some extent at least has been exercised by the Legislature itself. The distinction made by the Legislature in this classification requires that those of the special classes shall, as we have shown, keep their *offices* open every week-day, etc., while those within the *per diem* class are neither required nor expected to give attention to the duties of the office every week-day, but are required to set apart such days

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of the week or month as the business of their townships may require, R. S. 1894, section 8083.

Whether, by implication, from the phrase "shall keep their *office* open," as employed with reference to the special classes of trustees, we could say that they are required to maintain an office room, and whether such maintenance is chargeable to their trusts, is not before us, but, as to the *per diem* class, there is no such expression in the statutes.

It is not our privilege to supply omissions of the Legislature; if there has been an omission to provide for offices for trustees, nor are we at liberty to create or delegate the power to trustees to make expenditures not expressly, or by necessary implication, granted by the Legislature, however much we should deem the expenditures just and reasonable. That there is no authority to the *per diem* class of trustees to incur an indebtedness on behalf of their trusts for office rentals, we have no doubt, and that it requires such authority from the Legislature, has been already decided in an analogous case. See *Board, etc., v. Axtell*, 96 Ind. 384. In that case it was held that in the absence of a statute requiring it, the county superintendent was not entitled to maintain an office at public expense. The exact question now before us has been considered by us in the case of *Kerlin v. Reynolds*, 142 Ind. 460, and the conclusion was there reached that office rentals and other office expenses were not proper charges. It follows from what we have said, that the circuit court did not err in sustaining the appellees' demurrer to the complaint and alternative writ.

The judgment is therefore affirmed.

MONKS, J., took no part in the decision of this cause.

Filed November 22, 1895.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1895, IN THE EIGHTIETH
YEAR OF THE STATE.

No. 17,886.

BOARD OF COMMISSIONERS OF JASPER COUNTY *v.*
ALLMAN, ADMINISTRATOR.

COUNTY.—*No Implied Liability for Injuries by Defective Bridges.—Cases Overruled.*—A county is not liable by implication for damages caused by negligence of its officers in respect to keeping bridges in repair, where the county commissioners have no power to appropriate county funds for that purpose, except when and so far as the road district is unable to make the repairs, and there is no statute giving a right of action against the county for its negligence or that of its commissioners, or authorizing the use of county funds to pay damages caused thereby. *House v. Board, etc.*, 60 Ind. 580, and the cases following it, so far as they declare the doctrine of implied liability of counties for the negligence of their officers in erecting and keeping bridges in repair, are overruled.

SAME.—*Liability for Acts or Omissions of Officers.*—Counties, being subdivisions of the State and instrumentalities of government exercising authority given by the State, are no more liable for the acts or omissions of their officers than the State.

142	573
142	700
142	573
144	109
144	116
146	312
147	454

142	573
149	66
142	573
155	7

142	573
170	576
170	577
170	608

142	573
171	370

Board of Commissioners of Jasper County v. Allman, Admr.

SUPREME COURT.—*Overruling Decision or Series of Decisions.*—*Appellate Procedure.*—It is the duty of the court to overrule a decision or series of decisions, if clearly incorrect either through a mistaken conception of the law or through misapplication of the law to the facts, if no injurious results would follow from their overthrow.

From the Newton Circuit Court.

S. P. Thompson, Stuart Bros. & Hammond, for appellant.

R. W. Marshall, Cummings & Darroch and *J. T. Brown*, for appellee.

MONKS, J.—This was an action by appellee to recover damages for the death of his intestate, caused, as is alleged, by a defective approach to a bridge over a water-course. This action was commenced in Jasper county, and the venue changed to the court below. To the complaint, which was in one paragraph, appellant demurred for want of facts, which was overruled. An answer of general denial was filed; the cause was tried by a jury; a special verdict was returned; and over a motion for a *venire de novo*, a motion for judgment in favor of appellant on the special verdict, a motion for a new trial, and a motion in arrest, judgment was rendered against appellant for six thousand dollars.

Appellant assigns as error the action of the court in overruling the demurrer to the complaint and the motion in arrest of judgment.

Appellant earnestly insists that “there is no liability by counties for injuries caused by the negligence of its officers in constructing or in repairing or failing to repair bridges over water-courses, for the reason that there is no statute imposing such liability; the overwhelming weight of authority is to the effect that the duty imposed upon counties to keep bridges in repair does not carry with it an implied liability to answer

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in damages for injuries sustained from defective or unsafe bridges; that such liability can only arise from express statutory enactment; and that the case of *Cones v. Board of Commissioners of Benton County*, 137 Ind. 404, in effect overruled the former holdings of this court in such cases."

It must be admitted that the decided weight of authority in such cases is as stated by appellant. From the numerous decisions to the effect claimed, we cite the following: *Cones v. Board, etc., supra*; *Smith v. Board, etc.*, 131 Ind. 116; *Morris v. Board, etc.*, 131 Ind. 285; *Board, etc., v. Dailey*, 132 Ind. 73; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148, 35 Am. Rep. 151; *Templeton v. Linn Co.*, 22 Ore. 313 (15 L. R. A. 730); *Manuel v. Board, etc.*, 98 N. C. 9; *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534; *Wood v. Tipton Co.*, 7 Baxter, 113, 32 Am. Rep. 551; *Brabham v. Supervisors*, 54 Miss. 363, 28 Am. Rep. 352; *White v. County of Bond*, 58 Ill. 297, 11 Am. Rep. 65; *Hedges v. County of Madison*, 6 Ill. 567; *Lorillard v. Town of Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730; *Granger v. Pulaski County*, 26 Ark. 37; *Downing v. Mason County*, 87 Ky. 208, 12 Am. St. Rep. 437; *Reardon v. St. Louis County*, 36 Mo. 555; *Swineford v. Franklin County*, 73 Mo. 279; *Clark v. Adair County*, 79 Mo. 536; *Gilman v. County of Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290, and note on pages 294 and 295; *Barnett v. County of Contra Costa*, 67 Cal. 77; *Scales v. Chattahoochee County*, 41 Ga. 225; *Board, etc., v. Riggs*, 24 Kan. 255; *Fry v. County of Albemarle*, 86 Va. 195, 19 Am. St. Rep. 879; *Watkins v. County Court*, 30 W. Va. 657; *Woods v. County Commissioners*, 10 Neb. 552; *Board, etc., v. Mighels*, 7 Ohio St. 109; *Baxter v. Turnpike Co.*, 22 Vt. 114

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(123); *Ward v. County of Hartford*, 12 Conn. 404; *Commissioners v. Martin*, 4 Mich. 557; 69 Am. Dec. 333; *Adams v. President, etc.*; 1 Me. 361; *Mitchell v. City of Rockland*, 52 Me. 118; *Altnow v. Town of Sibley*, 30 Minn. 186, 44 Am. Rep. 191; *Dosdall v. County of Olmsted*, 30 Minn. 96, 44 Am. Rep. 185; *Board, etc., v. Strader*, 18 N. J. L. 108; *Cooley v. Freeholders*, 27 N. J. L. 415; *Young v. Commissioners*, (S. C.) 2 Nott & Mc. C. 537; *Farnum v. Town of Concord*, 2 N. H. 392; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Morey v. Town of Newfane*, 8 Barb. 645; *Heigel v. Wichita Co.*, 84 Tex. 392, 31 Am. St. Rep. 63, and note pp. 65 and 66; *Ensign v. Board, etc.*, 25 Hun, 20; *Albrecht v. Queens County*, 32 N. Y. Supp. 473; *Smith v. Board, etc.*, 46 Fed. Rep. 340; *Barnes v. District of Columbia*, 91 U. S. 540; *Bailey v. Lawrence Co.*, (S. D.), 59 N. W. Rep. 219; *Cooley Const. Lim.* (6th ed.), 301; 1 *Dillon Munic. Corp.*, sections 25, 26; 2 *Dillon Munic. Corp.*, sections 996, 997, 999; 4 *Am. and Eng. Ency. of Law*, pp. 364, 367, and notes; 15 *Am. and Eng. Ency. of Law*, 1143-4, and cases cited in note 1; 1 *Beach Pub. Corp.*, section 734; *Tiedeman Munic. Corp.*, sections 3, 325.

By common law the inhabitants of a county were required to repair bridges over water-courses. *Board, etc., v. Bailey*, 122 Ind. 46 (48); *State v. Gorham*, 37 Me. 451; *State, ex rel., v. Board, etc.*, 40 N. J. L. 302; *State v. Hudson County*, 30 N. J. L. 137; *Rex v. Oxfordshire*, 16 East, 223.

Yet it is settled law that counties were not liable at common law for injuries caused by negligence in failing to keep such bridges in repair. *Cones v. Board, etc.*, *supra*, and authorities heretofore cited.

It is a well settled proposition that when subdivisions of a State are organized solely for a public purpose by a

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general law, no action lies against them for an injury received by any one on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute; that such subdivisions, as counties and townships, are instrumentalities of government and exercise authority given by the State, and are no more liable for the acts or omissions of their officers than the State. *Cones v. Board, etc., supra*; *Morris v. Board, etc., supra*; *Board, etc., v. Dailey, supra*; *Smith v. Board, etc., supra*; *White v. Board, etc., 129 Ind. 396*; *Abbett v. Board, etc., 114 Ind. 61*, and cases cited on page 63; *Freel v. School City, 142 Ind. 27*; *Summers v. Board, etc., 103 Ind. 262*; *Board, etc., v. Boswell, 4 Ind. App. 133*; *Edgerly v. Concord, 62 N.H. 8, 13 Am. St. Rep. 533*; *Goddard v. Inhab. of Harpswell, 84 Me. 499, 30 Am. St. Rep. 373*, and note on pp. 398, 402; *Howard v. City of Worcester, 153 Mass. 426 (12 L. R. A. 160), 25 Am. St. Rep. 651*; *Larrabee v. Inhab. of Peabody, 128 Mass. 561*; *Clark v. Inhab. of Waltham, 128 Mass. 567*; *Hill v. City of Boston, 122 Mass. 344, 23 Am. St. Rep. 332*; *Wixon v. Newport, 13 R. I. 454, 43 Am. Rep. 35*; *Finch v. Toledo Board of Education, 30 Ohio St. 37, 27 Am. Rep. 414*; *Lane v. Township of Woodbury, 58 Iowa, 462*; *Flori v. St. Louis, 69 Mo. 341, 33 Am. Rep. 504*; *Bigelow v. Inhab. of Randolph, 14 Gray (Mass.), 541*; *Ford v. School District, etc., 121 Pa. St. 543 (1 L. R. A. 607)*, and all authorities cited on the proposition concerning bridges.

In *Board, etc., v. Chipps, Admr., 131 Ind. 56 (16 L. R. A. 228)*, this court said: "The decided weight of authority is that, in the absence of a statute upon the subject, a county is not liable for a failure to keep its bridges in repair. Elliott Roads and Streets, p. 42."

It was held by this court in *Smith v. Board, etc., supra*, that a county is not liable for an injury to a

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servant, sustained without his fault, while engaged in tearing down one of its bridges, although he worked under the immediate charge of its agent, who was known by the board of commissioners to be incompetent, which incompetency was the proximate cause of the injury. The court said: "A county is a civil or political division of the State, created by general laws to aid in the administration of the government, and in the absence of a statute, imposing special duties with corresponding liabilities, is no more liable for the tortious acts of negligence of its officers and agents, than the State."

In *Morris v. Board, etc., supra*, this court held that a county was not liable in an action for damages resulting from a failure of the board of commissioners to keep the jail in a healthy and inhabitable condition. The court said: "The most logical and generally accepted theory is, that political subdivisions, such as counties and townships, are created to give effect to, and enable citizens to exercise the right of local self-government. *State, ex rel., v. Denny*, 118 Ind. 449 (4 L. R. A. 65); *White v. Board, etc.*, 129 Ind. 396. Such subdivisions are instrumentalities of government, and exercise authority delegated by the State, and act for the State. As the State is not liable for the acts or omissions of its officers, neither should a political subdivision of the State be liable for the acts or omissions of its officers, as relating to political powers."

White v. Board, etc., supra, and *Summers v. Board, etc., supra*, are to the same effect. This court held in *Board, etc., v. Dailey, supra*, that a county is not liable for damages occasioned by the negligence and carelessness of the board of commissioners in the care and control of the court house. The court said: "It is now well settled that counties are involuntary corporations, organized as political subdivisions of the State for gov-

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ernmental purposes, and not liable any more than the State would be liable, for the negligence of its agents or officers, unless made liable by statute.”

In *Cones v. Board, etc., supra*, this court held that a county could not be held liable for personal injuries sustained while traveling upon a free gravel road of the county, and by reason of the defects in the construction and repair of such road. The court also expressly declared that the county was not liable at common law for the negligence of its officers, and that no liability existed by statute with reference to bridges. The court said: “It is quite true that the principle adopted in the bridge cases is in perfect analogy to the case before us, and if we would be consistent, those cases would control the present; but we are fully convinced that the principle there adopted of an implied liability is not in harmony with the great weight of authority, ancient and modern. * * * The liability did not exist at common law and does not exist by statute with respect to bridges or highways, and the objections to liability are well stated in *Hollenbeck v. County of Winnebago*, 95 Ills. 148, as follows: ‘No reason is perceived why a county should be held to respond in damages for the negligence of its officers while acting in the discharge of public corporate duties enjoined upon them by the laws of the State. * * * Clothed with but a few corporate powers, and these not of a private character. * * * In fact, the powers and duties of the counties bear analogy to the governmental functions of the State at large, that as well might the State be held responsible for the negligent acts of its officers, as counties.’ * * * It will be found that the authorities upon which cities and towns, as municipal corporations, are held liable for the results of the negligence of official duties, make this distinction: that such municipalities are voluntary cor-

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porations, organized for corporate purposes and possessing legislative, administrative and judicial functions not possessed to the same degree by counties or townships, and that they exercise and enjoy advantages purely local and which are independent of the State, and inure to their benefit as distinguished from that of the State.

“We are aware that profound jurists do not agree with the doctrine that cities and towns are less governmental subdivisions of the State * * than counties or townships, but, aside from the reasons so stated for the support of the distinction, it is plain to us that counties have no such power as cities or towns to ordain in a corporate capacity, what improvements shall be made, the free choice of agents to make them, and the discretion as to the rate of the levy to be made for the same. Nor have counties the express power, nor the power necessarily implied, to raise funds to pay damages for injuries, unless we imply this power, not from legislative grant, but from the liability implied in any case.

“General powers are not extended to counties, but the measure of their privileges must be found expressed by, or necessarily implied from, some statute.”

The doctrine declared in *House v. Board, etc.*, 60 Ind. 580, and the cases following it is, that the laws of this State concerning the building and repair of bridges imposed the duty upon counties to keep public bridges in such repair that they are reasonably safe for travel, and gave them ample power to provide the means necessary to make such repairs, and that, therefore, there was an implied liability to answer in damages for injuries from a failure to discharge that duty.

But even if the doctrine of implied liability from a duty enjoined, and the provision of means for the performance of that duty declared and applied in the bridge

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cases is a correct and not an erroneous statement of the law, it yet remains for us to determine whether the cases named can be sustained on this ground, to do which we must ascertain whether the Legislature has given the boards of commissioners the power and provided them with the means and instrumentalities to cause the bridges in their respective counties to be kept in repair, for, unless this has been done, no liability can be implied, even though the doctrine of implied liability is correct.

“The first section of the act, to provide for the erection and repair of bridges (section 2885, R. S. 1881; section 3275, R. S. 1894), provides: ‘That whenever, in the opinion of the county commissioners, the public convenience shall require that a bridge shall be repaired or built over any water-course, they shall cause survey and estimate therefor to be made and direct the same to be erected.’”

The second section (section 2886, R. S. 1881; section 3276, R. S. 1894) provides: “If the estimate therefor shall exceed the ability of the road district in which such bridge is to be built, by the application of its ordinary road work and tax, to perform, the county commissioners may make an appropriation from the county treasury to build or repair the same.”

The third section (section 2837, R. S. 1881, section 3277, R. S. 1894,) enacts that “Such board shall receive and appropriate all donations for the erection and repair of bridges; they shall also aid the same, when of general importance, by advances from the county treasury, and shall make such regulations in reference to payments and kinds of bridges as to them shall seem proper: *Provided, however,* That if the board of commissioners of any such county shall not deem any such bridge of sufficient importance to make an appropria-

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tion from the county treasury for the erection or repairs thereof, the trustee of any township * * may appropriate any part of the road tax fund in the township treasury for that purpose, if he shall deem it right and expedient so to do."

And section 11 (section 2892, R. S. 1881; section 3682, R. S. 1894) provides that: "The board of commissioners of such county shall cause all bridges therein to be kept in repair, and shall cause the township superintendent of the proper road district to keep in a conspicuous place, at each end of any bridge in his district, whose chord is not less than twenty-five feet, the following notice in large English characters: 'One dollar fine for riding or driving on this bridge faster than a walk.' And if any person shall ride or drive over any such bridge faster than a walk, for any such offense he shall forfeit and pay one dollar, to be recovered by the proper township superintendent before any justice of the peace of the proper county; which shall be applied to the repairs of such bridge."

It will be seen from an examination of these sections, which must be construed together, that the power of the board of commissioners to appropriate the county funds for the repair of bridges is limited to certain cases. While the county is required by the eleventh section to cause the bridges in the county to be kept in repair, the expense of the same under section 2, unless too great, must be borne by the road district alone, for the reason that the board of commissioners can only make an appropriation out of the county treasury to repair a bridge, in cases where the estimates therefor exceed the ability of the road district, by application of its ordinary road work and tax to perform. If the road district is able, by its ordinary road work and tax, to make the repairs, the board of commissioners have no

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power to appropriate the county funds to pay for repairing the same. In such a case the board is powerless; the supervisor of a road district is a township, not a county officer, and is not under the control of the county commissioners. He is an independent agent, subject only to the control, in some degree, of the township trustee. Sections 6818–6838, R. S. 1894. He does not represent the county, and the county is not responsible for his acts. *Dooley v. Town of Sullivan*, 112 Ind. 451 (454–455); *Vigo Township v. Board, etc.*, 111 Ind. 170; *Abbett v. Board, etc.*, *supra*, on page 65.

Neither has the board of commissioners any power to appropriate the road tax fund or any other township fund in the hands of the county treasurer, township trustee, or supervisor, to pay the expense of said repairs. *Vigo Township v. Board, etc.*, *supra*.

The board of commissioners might, perhaps, institute an action, and by writ of mandamus compel him to make such repairs. Certainly the county would not be held liable for the failure of the board of commissioners to institute an action against such supervisor, and by writ of mandamus compel him to repair a bridge.

Under section 3 the board of commissioners have no power to appropriate county funds for the repair of a bridge, unless they deem it of sufficient importance. If they do not deem such bridge of sufficient importance to make an appropriation out of the county funds for its repair, then they have no power to make the appropriation, and cannot rightfully do so.

It certainly cannot be claimed that, under these sections, the board of commissioners have any general power to make appropriations of county funds for the repair of bridges. Such appropriations can only be made in certain cases, and upon certain contingencies. And in cases where they cannot make such appropria-

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tion, no way is provided by which they can compel such repairs to be made by the road supervisor, except, perhaps, by expensive and frequent litigation, which was certainly not the intent of the Legislature.

This act was considered and construed by this court in the *Driftwood, etc., Turnp. Co. v. Board, etc.*, 72 Ind. 226, which was an action on a contract made by the county to keep the approaches to a bridge in repair. Worden, J., speaking for the court, said: "The mode in which the county is bound to perform that duty is specifically pointed out by statute, and a contract which contravenes that mode, and substitutes another, must be void. If the contract sued on is valid, and has been broken, the damages of the appellant must be paid out of the county treasury. But it was not contemplated that the expense of repairing bridges should be paid out of the county treasury, except upon a contingency. By the first section of the act above set out, when a bridge is to be repaired or built, the commissioners are to 'cause surveys and estimates therefor to be made, and direct the same to be erected.'

"Why were surveys and estimates to be made? The second section answers this question. It is because *the appropriation from the treasury* depends upon the question whether the estimate exceeds the ability of the road district, by the application to the work of the ordinary road work and tax of the district. It was not contemplated that the expense should be borne by the county treasury, except the excess beyond the ability of the road district. If this contract were to be held valid, the county would have to pay all the expense of the repairs, in the way of damages, no portion falling upon the road district. The contract is in violation of the provisions of the statute and void.

"The eleventh section of the statute, making it the

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duty of the commissioners to cause all bridges in the county to be kept in repair, must be construed in connection with the first and second. While the commissioners must cause the bridges to be kept in repair, the expense must be borne by the road district, so far as it is able, according to the second section, and the residue by the county.

“The third section provides that the commissioners shall aid in the erection and repair of bridges, when of general importance, by advances from the county treasury. The contract cannot be upheld by virtue of this section. * * * *

“The obligation to aid by advances from the county is not unconditional, as is seen by the proviso to the section. It depends upon whether or not the board of commissioners shall deem the bridge to be of sufficient importance to make an appropriation from the county treasury for the erection or repair thereof. The duty of the board in making or withholding advances from the county treasury, involves a question of judgment as to the importance of the bridge, and this judgment must be exercised as to the importance of the bridge at the time an advance is made. The board could not, by a contract to make advances in the future, preclude itself, or its successors from the right and duty to determine, at the time an advance is sought, whether the bridge has the importance required, in order to justify an advance from the county treasury.”

It follows, therefore, that the board of commissioners can only cause bridges to be repaired by an appropriation of county funds to pay the expense, when the road district is not able, by its road work and tax, to make the same, and the commissioners deem the bridge of sufficient importance to appropriate the county funds for that purpose, and in such case the expense must be borne

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by the road district, so far as it is able, and the residue by the county.

If this is a proper construction of said act, and it was so decided in *Driftwood, etc., Turnp. Co. v. Board, etc., supra*, the board can in no case pay for repairs out of the county treasury, unless the road district first applies its ordinary road work and tax in making the repairs, then the board may, if it deem the bridge of sufficient importance, pay the residue out of the county treasury. So that in all cases where there is a refusal to apply the ordinary road work and tax of the road district in repairing a bridge, the only way they can cause the repairs to be made, is by compelling the road supervisor to make such repairs, and no power has been given, or adequate means provided, by which they can coerce him, or any other officer, to make such repairs.

If it were conceded that when the duty is imposed upon boards of commissioners to cause all bridges to be kept in repair, and they have power to make the appropriations from the county treasury for that purpose, there is an implied liability to respond in damages for an injury resulting from a failure to discharge that duty, yet no such liability could be implied in this State, for the reason that the boards of commissioners have no power to appropriate the county funds for such purpose, except upon a contingency over which they have no control, and then only when in their judgment the bridge is of sufficient importance.

It was said in the case of *House v. Board, etc., supra*, that "cities are held liable for failing to keep their streets in repair, though no statute expressly provides for such liability, and that the same principle will apply as well to a county as a city."

There is a wide difference, however, between the powers of boards of commissioners with reference to

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bridges and the powers of cities over the streets. Cities may ordain what improvements shall be made and how the expense of the same shall be paid and may choose the agents to make them. The city council may fix the date of its meetings and may be called in special session by the mayor or five councilmen at any time. The city has officers whose duty it is to keep all the streets in repair, and who have ample authority at all times to act for the city in making such repairs, and who have constant supervision over the streets.

The board of commissioners meet in regular session only four times a year, in March, June, September and December, and have no power to meet at any other time except when called in special session by the county auditor when the public interest requires it, and he is the sole judge of the necessity of such special sessions. Sections 5736, 5737, R. S. 1881, sections 7821, 7822, R. S. 1894.

The auditor is an independent public agent who does not act for or represent the county, and for whose conduct the county is in no way responsible. *Vigo Township v. Board, etc., supra; Dooley v. Town of Sullivan, supra; Abbett v. Board, etc., supra.* So that whether the board shall meet in special session to cause a bridge to be repaired depends upon an officer who does not represent the county and for whose acts the county is not responsible.

A county board cannot make a valid contract for the repair of a bridge except when in legal session as a board. Their powers are created and defined by statute. They are agents with limited powers and for any act done by them not within the scope of their powers the county is not liable. *McCabe v. Board, etc., 46 Ind. 380 (383); Board, etc., v. Ross, 46 Ind. 404; Campbell v. Brackenridge, 8 Blackf. 471; Potts v. Hender-*

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son, 2 Ind. 327 ; Tiedeman on Munic. Corp., section 3.

They are authorized by statute to appoint a superintendent to erect a bridge, but not to keep bridges in repair. Section 2888, R. S. 1881, section 3278, R. S. 1894.

When the board is not in session no one is or can be authorized, as the law now stands, to represent or act for or bind the county in keeping bridges in repair, or in contracting for the repair of the same. *Driftwood, etc., Turnp. Co.. v. Board, etc., supra*, on pages 239, 240 ; *Potts v. Henderson, supra* ; *People, ex rel., v. County Officers*, 15 Mich. 85. So that if the board of commissioners had the power to appropriate the county funds to pay for the expense of repairing bridges in all cases, without any limitations or conditions whatever, they could not exercise that power when not in session; and as neither they nor any one representing or acting for the county can call them in special session, most certainly it could not be said, even in that case, with all the powers named, that they had been given the power or provided with the means and instrumentalities necessary to keep the bridges of the county in repair, unless they also, at least, had the power to meet as a board at any time of their own volition.

The authority of the board of commissioners acting as a board of turnpike directors in respect to free gravel roads, is much more like the power cities have in regard to streets than is that of the board of commissioners in regard to bridges, and there is therefore much greater reason for holding that the doctrine of implied liability applies to counties with reference to free gravel roads than with respect to bridges.

The board of commissioners is by statute constituted a board of turnpike directors having exclusive management and control of the free gravel roads of the county.

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The board is required to divide the county into three districts as nearly equal in number of miles of free gravel road as practicable, and each member is given personal control and supervision over one of such districts, and has the power to keep the same in repair subject to the rules and regulations of the board. The board fixes the time of its meetings and is empowered to appoint persons to superintend the work of repairs and let contracts therefor; contract for, or condemn and take material for, the repair of such roads, and issue certificates therefor; to cause to be levied and collected taxes to pay for the expense of keeping such roads in repair. These powers have been changed to some extent by the amendment of 1895. Sections 6868–6875, and sections 6912, 6933, 6935, 6950, 6958, R. S. 1894, Acts 1895, p. 363.

Yet, as we have seen, this court held in *Cones v. Board, etc., supra*, and we think correctly, that there is no implied liability against the county in favor of one injured by reason of a failure to keep a free gravel road in repair.

It is the duty of township trustees and road supervisors, at all times, to keep the bridges in repair and protect them from injury. Section 6818, 6832 to 6838, R. S. 1894. *Board, etc., v. Bailey*, 122 Ind. 46, on pages 49, 50, *supra*. They also have the power to construct bridges. Sections 3276, 3277, 6833, R. S. 1894; section 3, Acts 1885, p. 202. And the township trustee has the power to levy an additional road tax and expend the same, as well as the ordinary road tax, in the construction and repair of bridges. Section 6834, R. S. 1894; section 4, Acts 1885, p. 202.

The township trustee had no power to levy an additional road tax to be used for the construction and repair of bridges until the act of 1885 was passed. Prior to

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that date, only the ordinary road tax was used for that purpose. Section 3276, 3277, R. S. 1894, *supra*. For each failure of the road supervisor to perform his duty as required by law, he is liable to a penalty of ten dollars, to be recovered by the township trustee, and all sums are for the benefit of the road district for which he was supervisor. Section 6838, R. S. 1894. It will be seen by an examination of these statutes that subsequent legislation has somewhat enlarged the powers and duties of township trustees and road supervisors in regard to bridges, and thus to some extent removed the reasons upon which the case of *House v. Board, etc.*, and the cases following it were predicated. *Board, etc.*, v. *Bailey, supra*, on pages 49–50. In the case last cited, Mitchell, J., speaking for the court, said: “The duty of erecting and repairing bridges over water-courses is imposed upon the board of commissioners, while the general duty of keeping such highways and bridges in repair is laid upon township trustees and road supervisors.” It is a principle established by all the authorities, that where a person or corporation is free from fault, there is no liability for the negligence of a person not voluntarily chosen by such person or corporation to perform an act. *Dooley v. Town of Sullivan, supra*; *Abbett v. Board, etc., supra*.

It is clear, however, from a consideration of all the statutes concerning the powers and duties of boards of commissioners and other officers, and especially those in regard to bridges, that the same did not then, and do not now, give any support to the assumption in those cases that the board of commissioners had been given either the unconditional power to contract for the construction or repair of bridges and appropriate the county funds to pay therefor or provided with the means and

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instrumentalities necessary to cause or compel the same to be done.

There is no provision in the statute which confers a right of action against the county for the negligent acts of the county or its board of commissioners in the management of the affairs of the county. No authority has ever been given the board of county commissioners to appropriate the county funds to pay damages in such cases, nor to levy and collect taxes for any such purposes. No fund has ever been provided, nor has any provision been made for raising money by taxation or otherwise to pay such damages. *Cones v. Board, etc.*, *supra*, on page 408. The power to allow claims against the county, and pay judgments against the county, creates no liability and gives no right of action to anyone. Such powers were given that the board of commissioners might pay just claims against the county, and not create a liability in favor of any one.

The principle asserted in *House v. Board, etc.*, *supra*, and the cases following it, in regard to the implied liability of counties, cannot be reconciled with those cases in this and other States which affirm the rule that a county is a subdivision of the State for governmental purposes, and is not liable for the negligence of its officers unless a right of action is expressly granted by statute.

But it is earnestly contended by appellee that if the rule of implied liability declared in the bridge cases was erroneous, the doctrine of *stare decisis* should be invoked to protect it, and the same should only be changed by legislation.

While the rule of *stare decisis* is a salutary one, yet it is not to be applied in all cases. If a decision or series of decisions are clearly incorrect, either through a mistaken conception of the law or through a misapplication

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of the law to the facts, and no injurious results would follow from their overthrow, and especially if they were injurious or unjust in their operation, it is the duty of the court to overrule such cases. 6 Alb. Law Jour. 329; *Church v. Brown*, 21 N. Y. 315 (335).

But if a principle of law, doubtful in its character or uncertain in the subject-matter of its application, has been settled by a series of decisions until it has become an established rule of property, or the basis of contracts, it should not be overthrown except from the most urgent considerations of public policy. *Hines v. Driver*, 89 Ind. 339; *Grubbs v. State*, 24 Ind. 295; *Harrow v. Myers*, 29 Ind. 469; *Rockhill v. Nelson*, 24 Ind. 422 (424).

To that extent only are courts ordinarily restrained from correcting mistakes which they may have made. It must not be understood, however, that a previous line of decisions affecting even property rights can in no case be overthrown; if the evil resulting from the principle so established is greater than the mischief to the community could possibly be from a disregard of former adjudications they should be overruled and a new rule declared. *Boon v. Bowers*, 30 Miss. 246.

What was declared by this court on this question in *Paul v. Davis*, 100 Ind. 422, is applicable here. The court said that "A judicial decision does not make unalterable law, nor is it law in the sense that statutes are law. It was justly said by Senator Platt, in *Yates v. Lansing*, 9 Johns. 415, that 'The decisions of courts are not the law; they are only evidence of the law.' In another case it was said: 'I hope we shall consider what a decision really is, and treat it accordingly; not as the law, nor as giving the law, but simply as evidence of the law: and not conclusive evidence, but only *prima facie* evidence of what the law is.' *Henry v. Bank of Salina*, 9 Hill, 535. Chancellor Kent says: 'Even a series of

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decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule and the extent of property to be affected by a change of it.' Again he says: 'It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' 1 Kent Com. 477. The Lord Chancellor of England said to the House of Lords: 'You are not bound by any rule of law which you could lay down, if, upon subsequent occasion, you should find reason to differ from that rule, that is, like every court of justice, and I regard this as a court of justice; it is inherent in the nature of every court of justice that it should have liberty to correct any error into which it may have fallen.' *Bright v. Hutton*, 12 Eng. Law and Eq. R. 1, *vide*, p. 15. In the case cited the earlier case of *Hutton v. Upfill*, 2 H. L. Cases, 674, was overruled, although it was a case growing out of the same subject-matter, and involving the same principle and substantially the same interests. The law is a science of principles, and this cannot be true if a departure from principle can be perpetuated by a persistence in error. If it be correct to affirm that there can be no departure from former decisions, then it would be true, as it has been well said that "In such cases *summum jus* might be *summa injuria*." Ram Legal Judg. 201.

"The supreme court of California, in discussing this general subject, said: 'But it is a solecism to say that causes should be tried upon wrong principles * * whether

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it be for the purpose of justice, or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it be so necessary in a given case, or not, is for the court to decide, as a matter of legal discretion, whenever the rule is invoked.' *Hart v. Burnett*, 15 Cal. 530, *vide*, op. 607. Consistency, purchased by adherence to decisions at the sacrifice of sound principle, is dearly bought. But we deem it unnecessary to further pursue this discussion, for we know quite well that there is not a court in England or America, that has not corrected erroneous departures from the principles of justice, by overthrowing previous decisions. * * *

“Much as we respect the principle of *stare decisis*, we cannot yield to it, when to yield is to overthrow principle and do injustice. Reluctant, as we are, to depart from former decisions, we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish, where distinction there is none. We have preferred the censure that sometimes falls upon us rather than to undertake to distinguish, and thus make ‘confusion worse confounded,’ where there is no room to limit or distinguish.”

The case of *House v. Board, etc.*, *supra*, and cases following, do not involve property rights, nor has the rule, which they declare, in any sense become a rule of property, or a basis for contracts. The overruling of those cases will not produce uncertainty in titles, or introduce doubt and confusion in questions of property or contracts. Under such circumstances, it is the duty of the court to correct its own errors, and the doctrine of *stare decisis* cannot be successfully invoked to perpetu-

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ate them. *Paul v. Davis, supra; Rockhill v. Neilson, supra; Hines v. Driver, supra; Linn v. Minor*, 4 Nev. 462; *McDowell v. Oyer*, 21 Pa. St. 417 (423).

This case is within the principle established in *Hines v. Driver, supra*, and *Paul v. Davis, supra*.

It is urged by appellee, that by holding the county liable in such cases as this, the boards of commissioners will be convinced that it is cheaper to keep the bridges in repair than to pay damages for injuries.

The enforcement of the penal statutes and the creation of personal liability, if it does not now exist, for injuries caused by neglect of official duty, would probably be more convincing to the officer than taking the public funds to pay such damages.

While the doctrine declared in the bridge cases might be properly overruled on other grounds stated in this opinion, we prefer to base our action on the broad ground that counties, being subdivisions of the State, are instrumentalities of government and exercise authority given by the State, and are no more liable for the acts or omissions of their officers than the State.

The case of *House v. Board, etc., supra*, and the cases following it, so far as they declare the doctrine of implied liability of counties for negligence of their officers in erecting or keeping bridges in repair, are overruled.

It follows that the court erred in overruling the demurrer to the complaint and the motion in arrest of judgment. There are other reversible errors in the record, but it is not necessary to consider them.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not in conflict with this opinion. All concur.

Filed November 25, 1895.

The Evansville and Richmond R. R. Co. v. Henderson.

No. 17,490.

THE EVANSVILLE AND RICHMOND RAILROAD CO. v. HENDERSON.

RAILROAD.—Employe.—Personal Injury.—Defective Track.—Assumed Risk.—Master and Servant.—A railroad employe employed on a construction train to haul cross-ties and material over an uncompleted track in the manner customary in the construction of railroads assumes the risk incident to such employment, and cannot recover for an injury caused by a derailment at a place which is not different from the other parts of the track.

From the Jackson Circuit Court.

W. R. Gardiner, C. G. Gardiner and W. R. Gardiner, Jr., for appellant.

Zaring, Hottel, Giles & Marshall and Applewhite & Applewhite, for appellee.

MCCABE, J.—The appellee sued the appellant in the Lawrence Circuit Court to recover damages resulting to him on account of a personal injury sustained by him through the alleged negligence of the appellant. The venue was changed to the Jackson Circuit Court, where a trial of the issues joined resulted in a verdict and judgment against the appellant for \$5,000.00. That judgment on appeal to this court was reversed on the evidence. 134 Ind. 636.

This court having intimated a doubt of the sufficiency of the facts stated in the complaint, on the return of the cause to the trial court, the appellee was permitted, over appellant's objection and exception, to file an amended complaint as to both paragraphs thereof. The issues joined were again tried by a jury, resulting in another verdict for the plaintiff in the same amount

on which he had judgment over appellant's motion for judgment *non obstante veredicto*, and for a new trial. Error is now assigned upon these several rulings, and that the trial court erred in overruling a several demurrer to each paragraph of the amended complaint. One of the reasons assigned in the motion for a new trial, is that the verdict is not sustained by sufficient evidence.

It is conceded by the learned counsel for appellee, that the former decision of this cause is the law of the case, and is decisive of the case, and must control our decision now upon the question of the sufficiency of the evidence to support the verdict, unless on the new trial the appellee introduced material additional evidence of such a character as to make the principles of law announced in the former decision inapplicable to the new case made by the new or additional evidence considered along with the evidence adduced before. This, we think, is the law. The law declared in the former opinion has been recently reaffirmed by this court, and applied to a similar state of facts, citing many other adjudications to the same effect in the *Bedford Belt R. W. Co. v. Brown*, 42 N. E. Rep. 359 (*post*, p. 659).

The substance of the evidence on the former trial is set out in the opinion on the former decision. See 134 Ind. 636.

The evidence that appellee claims was added on the last trial, is to the effect that a day or two before the accident, at the point where it happened, there was noticed by witness, Henry Martin, that there were not many ties under the "T" railing, and some of the ties were loose, and some of them were regular, and some were wide apart, and the spikes in the railing would hold them up from the road bed. They would shake up and down when walked on by a man; the railing would hold them up from the road bed, and in places there would

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be two or three close together, and then they would be wide. Made no other observation in regard to it.

Another witness, Philip Clipp, testifying about the accident, noticed the engine curving to the left, and when it came to me it upset my dinner bucket, and we had one empty car, and when it came to that, I saw the car go over, and men and cars were together. Saw the engine and the car behind it, and so on, until I saw every car, until it came to the half-loaded car, and I saw the men and the cars going together, and the other cars, and split at that point. Went back there as quick as I could, and saw men and cross-ties there together. Did not notice whether the road was only half-tied where we loaded the ties. We were going to take the ties down between Bedford and Heltonville. It was not quite done there. We stopped between Bedford and Indian Springs once, to take a fence down. Any one going down on the train from Bedford to Indian Springs, who looked, could have seen the condition of the road. The train going down that morning slowed up on account of some cattle being on the road. It came so near stopping, a person could have got on. The road was half-tied. The engine got over that place in the track and seven loaded flat cars. I felt the train wobbling. Any one could see the road was only half-tied. Witness Doan testified that the road was not half tied at the point where they loaded the ties.

It was further shown by the testimony that the speed of the train when the accident occurred was only eight or ten miles an hour, which was very slow.

This evidence makes no substantial change in the case as made by the evidence when it was here before. It is true it does show affirmatively what did not before appear, that the train was not being run at an unnecessary and reckless rate of speed as was before supposed.

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But the decision before did not turn on the rate of speed at which the train was running, but it turned upon the fact that appellee had accepted employment to work on the appellant's construction train to run on its road that had not yet been opened to business, the track of which was only partially completed, the iron being laid and spiked onto half the proper number of cross-ties without ballast, so as to use such imperfect track to haul the ties and other material for the construction and completion of the road over such imperfect or incompleted track as was customary in the construction of railroads in this State; and that such defects being equally open to the observation of both employer and employe, the appellee had assumed all the risks incident to such employment, and could not recover for that reason. There is no evidence to show that the defect at the point where the accident occurred was different from the defects all along the imperfect and unfinished track, or was otherwise than such as are incident to all railroads in course of construction, as the evidence both times shows that this road was.

Therefore, the principles of law declared and announced in the former decision of this case render it imperative that we reverse the judgment. *Mason v. Burk*, 120 Ind. 404; *Board, etc., v. Jameson*, 86 Ind. 154; *Gerber v. Friday*, 87 Ind. 366; *Jones v. Castor*, 96 Ind. 307; *Cleveland, etc., R. W. Co. v. Wynant*, 134 Ind. 681. The judgment is, therefore, reversed, and the cause remanded with instructions to grant the appellant's motion for a new trial.

Filed November 25, 1895.

No. 17,626.

CUMMINGS ET AL. v. CITIZENS' BUILDING, LOAN AND SAV-
INGS ASSOCIATION.

EVIDENCE.—*Special Finding, When Not Sustained.*—*Building and Loan Stock.*—*Assessment.*—A finding that there is due plaintiff in principal and interest, on a note in suit, a specified sum, is not sustained by evidence showing that the suit was brought to recover an assessment made by plaintiff on defendant's stock, and not upon any unpaid principal or interest.

From the Perry Circuit Court.

S. H. Esarey and *W. Henning*, for appellants.

W. A. Land, for appellee.

JORDAN, J.—Appellee is an incorporated Building, Loan and Savings Association organized under the laws of this State. It commenced this action to recover a judgment against appellant Eugene F. Cummings, on a promissory note, and to foreclose a mortgage executed by him and his wife, a co-appellant herein, to secure the payment of the note.

The complaint alleges that on the 2nd of December, 1889, the defendant Eugene F. promised to pay to the plaintiff nine hundred dollars, with interest at six per cent. That there is due and unpaid thereon the sum of two hundred dollars, principal and interest. The pleading further avers the execution of the mortgage to secure the payment of the note, and that a copy of each is filed and made a part thereof, and judgment for two hundred dollars and foreclosure of the mortgage is demanded.

142	600
146	644
142	600
152	648

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The note mentioned in the complaint is as follows :

“CANNELTON, IND., Dec 2, 1889.

“\$900.

“On or before March 29, 1893, I promise to pay without any relief from valuation or appraisement laws to the Citizens' Building, Loan and Savings Association, or order, the sum of nine hundred dollars, together with interest thereon at the rate of six per cent. per annum from date, with attorney's fees, said interest to be due and payable bi-weekly, in advance, to the cashier of said association; and on failure to pay any interest when due, then the whole principal and interest shall be due and payable.

EUGENE F. CUMMINGS.”

The mortgage, which was executed of the same date as the note, after describing the premises and the note in question, stipulated that it was executed to secure the payment thereof, when the series of stock therein mentioned shall mature. It further recited “that the principal of the note was the amount loaned to Cummings, on nine shares of unpaid stock of said association, held by him, of \$100.00 each, and belonging to series number one; that the mortgage was also to secure the payment of all dues, fines, and penalties, and the due performance of all the duties of the mortgagor, as a member of said association until the series to which said stock belongs shall end, in accordance with the act under which the association was organized, and its constitution and by-laws; that in the event of the mortgagor's neglect for a period of three months, to pay these fines, penalties, etc., the note shall then become due, etc., and upon a foreclosure of the mortgage the judgment shall include all interest, dues, fines, forfeitures, and all other indebtedness which shall be due and owing in connection with stock or loan.”

Cummings et al. v. Citizens' Building, Loan and Savings Association.

The appellant contends that the complaint is not sufficient in facts to constitute a cause of action, and that the demurrer thereto ought to have been sustained. The evident theory of the pleading, as outlined by the averred facts, is to obtain a judgment of an unpaid balance due upon the note, and for a foreclosure of the mortgage. There are no allegations which show that appellant is in arrears, or in default of payment of any fines, dues, penalties, assessments, etc., under the laws or by-laws referred to in the mortgage. Possibly, however, the complaint was sufficient to withstand a demurrer for the reason that it may be, at least, said that it contained facts sufficient to constitute a cause of action upon the note, as it appears from the record that the action was commenced after the time fixed in the note for its maturity.

The trial court sustained a demurrer to several paragraphs of appellant's answer, and these rulings are assigned as error. But as the judgment must be reversed and remanded to the lower court, upon another ground, we may properly pass these alleged intervening errors without consideration, as probably appellee can (if the facts will warrant) so amend and frame its complaint as will better enable appellant, upon another trial, to present and have determined the questions involved under the facts alleged in the answer. Upon the trial there was a finding, by the court, that there was due to plaintiff, upon the note in suit, principal and interest, the sum of \$60.21, and ten dollars attorney's fees; and over a motion for a new trial, for causes assigned (among which were that the finding was not sustained by the evidence; that it was contrary to the latter, and also to law), judgment was rendered upon the finding for \$70.21, and a foreclosure of the mortgage.

We have examined the evidence in the record, and it

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conclusively shows, without any contradiction, that appellee was by this action seeking to recover an assessment made upon appellant's stock held by him in the association, and not upon any unpaid principal or interest of the loan embraced in the note. It appeared that he had paid all dues, fines and penalties upon this stock up to March 29, 1893, which was the date of the expiration of the series to which his stock belonged; and that the money appellee was seeking to recover by this action was a sum growing out of an assessment made on June 13, 1893. The evidence further shows that the association had sustained no losses, but how or in what manner the assessment was made is not disclosed. It is a well recognized principle of law that a case must be put upon trial upon a definite theory. This theory, the complaint must outline, the evidence sustain, and the law support. A party to recover against his adversary must do so *secundum allegata et probata*.

The evidence, at least, must substantially correspond with and support the allegations, and be confined to the point in issue.

In the case at bar the complaint presented one theory, and the evidence disclosed a substantially different one; and viewed in the light of the rule above stated, the finding of the court was not sustained by the evidence, and was contrary thereto, and the motion for a new trial should have been granted.

We need not, and do not, decide the question whether, under the facts, had the action been based upon a proper complaint, appellee would have been entitled to recover.

In the case of *Wohlford v. Citizens' Building Association*, 140 Ind 662 (29 L. R. A. 177), this court held that the assessment made upon the members' stock in that case, under the facts therein, was authorized, and that assessments warranted by the char-

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ter or laws pertaining to such associations, or by the by-laws thereof, may be included in, and covered by, the note or mortgage of the borrowing member; and, upon default of payment, an action for the recovery thereof may be instituted thereon.

For the error in overruling the motion for a new trial, the judgment is reversed, and the cause remanded, with instructions to the lower court to sustain the motion for a new trial, and to grant appellee leave, upon request, to file an amended complaint, and for further proceedings in accordance with this opinion.

Filed November 25, 1895.

 No. 17,293.

MITCHELL v. BAIN ET AL.

PLEADING.—*Complaint.*—*Easement by Prescription.*—*Private Way.*—

Title.—A complaint alleging that plaintiffs are the owners of certain land; and that the only means of access thereto is over a specified road; and that the same has been used by plaintiffs and the grantors for fifty years continuously; and that during all such time such road has been and still is an easement and right of way connected with plaintiffs' land, sufficiently alleges their title to such road to withstand demurrer.

SAME.—*Complaint.*—*Easement.*—*Adverse User.*—An allegation that plaintiffs and their grantors have for fifty years continuously used a private road under a claim of right, as a means of access to their land, with defendant's knowledge and acquiescence, and without objection on his part, sufficiently alleges that such use was adverse.

SPECIAL FINDING.—*Private Way.*—*User.*—*Presumption.*—*Title by Prescription.*—Failure to find whether the use for fifty years of a private road by plaintiffs and their grantors was permissive is equivalent to a finding that it was not permissive, under the statute providing that an unexplained use of an easement for twenty years will be presumed to be under a claim of right, or adverse and sufficient to establish title by prescription.

142	604
149	351
142	604
155	288

142	604
163	237
163	545
163	548

142	604
165	132

142	604
166	21
166	539
168	211

142	604
170	122

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WATER-COURSE.—*Defined.*—*Diverting.*—Water which has a definite source in a spring, and takes a definite course, is a water-course, which cannot be lawfully diverted from its natural channel so as to injure another's land, although at a certain point it spreads over marshy ground without a defined channel, where it again flows in such a channel. (See note at end of opinion.)

SURFACE WATER.—*Embankment.*—*Collecting and Discharging in a Volume on Private Way.*—A land-owner cannot, by an embankment, collect surface water on his own land and send it out in a volume on the private road of another to his injury.

From the Morgan Circuit Court.

C. G. Renner and *J. V. Mitchell*, for appellant.

W. R. Harrison, *J. H. Jordan* and *O. Matthews*, for appellees.

MONKS, J.—This was an action brought by appellees to enjoin appellant from erecting and maintaining an embankment on his own land, by means of which the water was collected and caused to flow and run in large quantities into a private road of appellees, their only means of ingress and egress to and from their farm of two hundred acres, thereby rendering the same unsafe for use, and to recover damages.

A demurrer to the complaint for want of facts was overruled, answer filed, and at request of appellant the court made a special finding of facts and stated its conclusions thereon. Appellant excepted to the conclusions of law; and, over a motion by him for a judgment on the special findings, the court rendered judgment in favor of appellees.

The only errors urged are: 1. The court erred in overruling the demurrer to the complaint. 2. The court erred in its conclusions of law.

Appellant insists that the appellees claim title to the private way in controversy, by prescription; and that the allegations in the complaint are not sufficient to sustain such title, for which reason the complaint is not good.

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It is alleged in the complaint, "that appellees are the owners of certain real estate; and that the only means of ingress and egress to and from said farm is over the road in controversy, to a public highway; and that the same has been used by appellees and those under whom they claim for fifty years to the present time, continuously; and that said road has been during all of said times, and still is an easement and right of way belonging to and connected with the aforesaid described land of these plaintiffs." This is a sufficient allegation, as to appellees' title to said road in controversy, to withstand a demurrer. Under this allegation, title to such easement may be shown by grant or prescription. *Steel v. Grigsby*, 79 Ind. 184; *Sanxay v. Hunger*, 42 Ind. 44.

The specific allegations, we think, are also sufficient to show title by prescription. Archbold N. P. (Finlay Ed.) Star, p. 457; 2 Chitty Pleading, 807-810; 3 Chitty Pleading, 1118, 1119; 2 Wms. Saunders, 113a, 128d, 114c, 114e. It is alleged "that appellees and their grantors have, for fifty years continuously, to the commencement of the action, used said road as a means of ingress to and egress from their real estate, with the knowledge and acquiescence of appellant and his grantors; and that said easement and right has been enjoyed by the appellees and their grantors for the period aforesaid without obstruction, hindrance or interruption under a claim of right so to do."

It is not essential that the word "adverse" be used. The rule is thus stated: In order that the enjoyment of an easement in another's land may be conclusive of the right, it must be adverse; that is, under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted.. 2 Greenl. Ev., (15th ed.), section 539, and notes; *Sargent v. Ballard*, 9 Pickering, 251; 2 Wms. Saunders, 175d, note 2.

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An allegation that the possession was under a claim of right, with the knowledge and acquiescence of the owner, is equivalent to an allegation that it was adverse. It is clear that the demurrer to the complaint was properly overruled.

It is also insisted by appellant that the special finding only shows that the appellees, and those under whom they claim, "enjoyed a permissive user of said lane or passway for sixty years or more, under a claim of right; but it is not shown that said claim of right was exclusive or adverse to appellant," and that this is fatal to appellees' case. There is nothing in the finding to show that the use of said road was permissive. The law is, that if there has been the use of an easement for twenty years unexplained, it will be presumed to be under a claim of right and adverse and be sufficient to establish the title by prescription and authorize the presumption of a grant, unless contradicted or explained. Washburn Easements, (4th ed.), section 31, p. 156.

If the use be unexplained, it will be presumed to be adverse. *School District v. Lynch*, 33 Conn. 330; *Hammond v. Zehner*, 23 Barb. 473, 21 N. Y. 118; *Biddle v. Ash*, 2 Ash. (Pa.) 211.

Where one uses an easement whenever he sees proper, without asking permission and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty years is a title which cannot afterwards be disputed. Such enjoyment without explanation how it begun is presumed to have been in pursuance of a grant. The owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract, inconsistent with a claim of right by the other party. *Nowlin v. Whipple*, 120 Ind. 596 (6 L. R. A. 159), and cases cited on p. 598; *Dyer v. Eldridge*, 136 Ind. 654; *Pierce v. Cloud*, 42 Pa.

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St. 102 (113-114); *Garrett v. Jackson*, 20 Pa. St. 335; *Hammond v. Zehner*, *supra*; *Sargent v. Ballard*, *supra*; *Blanchard v. Moulton*, 63 Me. 434; *McArthur v. Carrie's Admr.*, 32 Ala. 75, 70 Am. Dec. 529; *Chalk v. McAlily*, 11 Rich. (S. C.) 153; *Blake v. Everett*, 83 Mass. 250; *Barnes v. Haynes*, 13 Gray 188; *Stearns v. Janes*, 94 Mass. 582; Washburn Easements, (4th ed.) pp. 156, 157 and 158, and notes.

It follows that the special findings, being silent as to whether the use of said road by appellees and their grantors was permissive, has the force of a finding for appellees as to that question; that is, that said use was not permissive. In this case, therefore, the uninterrupted use of the road in question by appellees and those under whom they claim for over fifty years, the same being their only means of ingress and egress to and from said farm, and it having been fenced on each side and worked and kept in repair by appellees, and those under whom they claim for over thirty years, without any finding that it was used by permission of appellant and those under whom he claims, or otherwise than under a claim or assertion of right, authorizes the presumption of a grant of the road as a private way to appellees and as appurtenant to their real estate. This is so for the reason that such use for twenty or more years, unexplained, will be presumed to be under an assertion or claim of right, and, therefore, adverse and not by lease or favor of the owner.

Appellant earnestly contends that appellees are claiming damages for the obstruction of a natural water-course, and that the special findings disclose that the water alleged to have been obstructed by the embankment built by appellant was surface water, for which the law furnished no remedy, "as the same is regarded as a common enemy, which any land-owner may ward

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off by erecting barriers against," citing *Weis v. City of Madison*, 75 Ind. 241 (249).

That part of the special finding necessary to present this question is as follows: "The private road from appellees' land is sixteen feet wide, and runs from the northeast corner of said land along the west line of appellant's real estate one-half mile, where it crosses the I. & V. R. R. track and intersects with a public highway. From the point where said private road intersects the public highway said highway runs north one-half mile upon or near the line dividing the lands of appellant and the heirs of Wilson Williamson, which last mentioned lands lie northwest of the intersection of said private road with said highway and railroad, and north of the railroad and west of said highway.

"Immediately west of said highway, as it passes between the lands of appellant and said heirs, the lands of said heirs are low and marshy, but incline to the west; that to the west of the marshy point of said lands of said heirs, and upon their lands, and about six or seven hundred feet west of and parallel with said highway there is a range of hills running in a south and southwesterly direction, which hills are more than one hundred feet above the common level, and a part being quite abrupt and steep. That at the height of twenty-five to thirty-five feet above the level point of the intersection of said private way with said highway, along the foot of said hills, and on said Williamson's land, are four or five springs from five to seven hundred feet west of said highway, which springs flow constantly in wet and dry weather, and furnish water sufficient in volume to fill a pipe from four to six inches in diameter, and have so flowed from time immemorial. That the hills slope from these springs for a distance of forty feet to the east and southeast to said marshy groundson

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said Williamson's land. That prior to the time Williamson owned the land, viz.: in 1884, the water from the springs flowed east and south toward the highway, and had no defined channel except near the springs; the waters when they reached the marshy grounds spreading out and reaching and flowing south in the ditch along the highway. In constructing said highway north from the turn of said point of intersection aforesaid, said highway was thrown up, making solid grade east of said marshy lands of said heirs, forming a ditch on the west side of said grade running south to a point near the turn in said highway west. The lands of said heirs have been, both the hilly and marshy points, in cultivation for more than ten years, and the owners thereof have endeavored, by plowing and ditching, to prevent the flow of the water in natural channels over their grounds, and have united the flow of water from two of the principal springs, in an artificial channel or ditch, which conveys the same to a point near the intersection aforesaid. Williamson has made ditches in cultivating his land for the flow of water east to the highway and kept them cleaned out. In times of heavy rains and melting of snows the waters from said springs and hills are increased and gather in considerable volume on the lands of said heirs, and have always, from time immemorial, flowed in a southwesterly course across and near where the said highway and said railroad intersect with said private road, and on and into the lands of appellant, and have flowed over and down upon said lands from time immemorial, through a trough or depression in the ground, which is of considerable width, ranging at different places from two hundred to three hundred feet, and varies in depth from one and one-half to three feet. That said trough or depression over appellant's land has been the natural

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course and trend of said waters from said springs, and also from said hills in times of heavy rains and melting of snows for more than sixty years, and the said water has run down the same for said period and over until diverted by appellant.

• “That said waters, when high, so run and flowed down over the land of appellant into bayous and low places on the lands of appellant and others until the same were filled up, and then turned in a westerly direction running into the lands of others and thence into White river. That the course of the water over appellant’s land, as aforesaid, is the only outlet that said waters have had from time immemorial.

“Appellant and his grantors, for a long time before this suit was commenced, cultivated the land in which said depression and channel is; said depression being cultivated with the rest of the land. Said water formed a pond and ponds upon the land of appellant, and when the flow of this water was increased in times of rains and melting snows from said hills, said pond and ponds would overflow and the water run down along said trough or depression, in the direction of said river, into said bayous. Appellant acquired title to said lands by will from his father, one James M. Mitchell, who died in 1885. Prior to the death of said James M. Mitchell, when he was the owner of said lands, the water from said springs ran onto said lands and kept said ponds replenished with water, and the same was used by said Mitchell for watering his hogs and cattle. That said springs flow at all times, but in very dry periods in the summer so much of the water becomes absorbed in the ground that the flow of the water at times reaches only to said highway. The water from said springs, after a long drought, does not flow onto appellant’s said land to any extent, but in times during rains, and when the

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ground is full of water, the flow of water therefrom onto appellant's land into said trough is considerable, and the volume of said waters in times of heavy rains and melting snows is greatly increased and flows in a large body down said course on appellant's land. That for twenty-five years and over a culvert has been kept and maintained by the road supervisor at said public highway a short distance west of the said turn at the railroad, for the passage of said water under said highway onto the lands of appellant. That in building the railroad, over twenty-five years ago, a waterway was provided by the company constructing the same for the passage of said water under said railroad bed at the corner of appellant's land, through which said water flows and has flowed onto appellant's land and thence down said course thereon. That the road-bed of appellees' road at a point south of where said water enters and flows upon said appellant's land, is near three feet higher than the appellant's land at the point where said water enters thereon, and that said water flowing and rising as aforesaid, at no time prior to the erection of the levee by the appellant hereinafter mentioned run down said road or in any way affected the same. That on April 1, 1891, appellant constructed and built on his own land across the course where said water flowed as aforesaid a solid levee and embankment three and one-half feet high, for the express purpose of diverting and obstructing the flow of said water. Said levee was erected by appellant upon said lands south of the north boundary line of said lands where the same abut upon the said road and highway, a distance of forty-four feet from said boundary line and about forty-four feet from the east line of appellees' road. That said levee and embankment, as the same was intended by appellant, did prevent and obstruct the flow of said

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waters from their natural course and collect the same together in large quantities within the confines of said levee upon said land, and then and thereby, by reason of said embankment, the same was forced to flow back and across said highway to about the depth of two feet in times of high water and then to flow over and down upon appellees' road and passway."

It is shown by the special findings that the water from the springs has flowed in an easterly direction towards the highway in a channel or channels to the wet, marshy grounds, where it has spread out and finally reached the highway and flowed down the west side thereof and under the culvert mentioned, then through the waterway under the railroad into appellant's land at the northwest corner of that part which lies south of the railroad; that the water from said springs has so flowed onto the land of appellant from time immemorial; that when the weather was very dry in the summer the water was absorbed before it reached appellant's land, but that at all other times it flowed into his lands in the same channel and into a pond or ponds; that while Williamson owned the land on which the springs were situated he diverted the water from its natural channel by making artificial channels and ditches through which the water flowed east to the highway; that the water flowed from the springs in a definite channel onto appellant's land in such quantities that it fed ponds thereon, and the same was used by appellant's grantor to water hogs and cattle; that the face of the country was such, on account of the range of hills, that it necessarily collected in one body a large quantity of water after heavy rains and melting of snow, which required an outlet and that the same flowed down the channel and course in which the water from said springs flowed, and the same had so escaped into White river for time immemorial.

There can be no doubt that if anyone had diverted the water from said springs so as to prevent it flowing through the usual channel onto appellant's land, such person would be liable to appellant in damages. *Gillett v. Johnson*, 30 Conn. 392.

It is true, as claimed by appellant, that a water-course is a stream of water having a bed, sides and banks, and the water need not flow continually; the channel may sometimes be dry. *Weis v. City of Madison*, *supra*. The size of the stream, however, is not material. Where water has a definite course, as a spring or springs, and takes a definite channel, it is a water-course, and no person through whose land it flows has any right to divert it from its natural channel so as to injure another land-owner. *Gillett v. Johnson*, *supra*; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Pyle v. Richards*, 17 Neb. 182; *Arnold v. Foot*, 12 Wend. 330; *Smith v. Adams*, 6 Paige 435.

A spring becomes a water-course from the point where the water comes to the surface and begins to flow in a channel or bed with such banks or shores as confine the water and cause it to run in a certain direction. Gould Waters, section 41; *Case v. Hoffman*, 84 Wis. 438, 36 Am. St. Rep. 937.

A stream does not cease to be a water-course and become mere surface water because at a certain point it spreads over low ground several rods in width and flows for a distance without a defined channel or banks before flowing again in a definite channel. *Macomber v. Godfrey*, *supra*; *Case v. Hoffman*, *supra*; *Pyle v. Richards*, *supra*.

If a water-course is lost in a swamp or lake, it is still a water-course if it emerges therefrom in a well defined channel. *Hebron Gravel Road Co. v. Harvey*, 90 Ind.

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192, 46 Am. Rep. 199 ; *Munkres v. Kansas City, etc., R. R. Co.*, 72 Mo. 514.

In *Gillett v. Johnson, supra*, there was a spring on defendant's land about sixteen rods from the dividing line between his and plaintiff's land, which supplied a small stream of water and ran to plaintiff's land, being sufficient to fill a half-inch pipe. The supply was constant except in very dry weather. For six or eight rods the water descended rapidly in a well defined course between abrupt banks to a piece of marshy ground, where it spread out so that its flow during the summer months was slight—not sufficient to break the turf, but was generally sufficient to form a continuous sluggish current along the surface in a natural depression to a watering place on plaintiff's land. The defendant diverted the stream on his own land and thereby deprived plaintiff of its use. It was held to be a water-course and the defendant was liable.

In *Pyle v. Richards, supra*, the lands of the plaintiff and defendant were south of the Nehama river, and the A. & V. railway ran nearly on a line between their respective tracts of land ; that of the defendant, the plaintiff in error, was south and higher than the land of the plaintiff, the defendant in error. One or more ravines extended some distance above defendant's land, in which were certain springs, from which, during a portion of the year, flowed a small stream. In very dry weather it went dry, or partially so ; down at the road it sank into the ground ; in wet weather it ran all the time. The natural course of the water through plaintiff's land was northeast. Defendant built a dam across the course of the water and made a new channel for the same, running north, so that the water was discharged through a culvert on the land of plaintiff. A large amount of surface water from melting snow and heavy

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rains also flowed through said channel. It was held to be a water-course, and the defendant was liable. The court also held that although surface water may accumulate in the channel of a stream, which is dry a part of each year, and greatly increase the flow of water at times, yet it will not defeat a recovery for injuries arising from a diversion of the stream, whereby its water was discharged over the land of another.

In *Macomber v. Godfrey, supra*, a stream of water flowed across a road into defendant's land, taking a northwesterly course across his land in a well defined channel, but when within five rods of plaintiff's land, the water spread out over the surface, covering a space of several rods in width, and thus ran upon and across plaintiff's land, which was a level meadow, and covered the same for a space of several rods in width, irrigated it in a valuable manner through its whole length, being about seven rods, and during the whole length on plaintiff's land had no defined channel, and not until a short distance beyond plaintiff's land, where it again formed a small brook, and ran off in a westerly direction. Defendant diverted the water on his own land and thereby prevented the same from flowing through the plaintiff's land. It was held to be a water-course, and that the defendant was liable. The court said: "If the whole stream had sunk into defendant's soil, and no water remained to pass to plaintiff's land, except under the surface, it would have ceased to be a water-course, and the plaintiff would have no right to it. * * * But where, owing to the level character of the land, it spreads out over a wide space without any apparent banks, yet usually flows in a continuous current and passes over the surface to the lands below, it still continues to be a water-course." Even surface water becomes a natural water-course at the point where it begins to form a reasonably

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well defined channel with bed and banks, or sides and current, although the stream itself may be very small, and the water may not flow continuously. Gould Waters, section 263; *Churchill v. Lauer*, 84 Cal. 233; *Kelly v. Dunning*, 39 N. J. Eq. 482.

In *Taylor, Admr., v. Fickas*, 64 Ind. 167, this court said: "The true doctrine in such cases, we believe, was expressed by the chancellor, in the case of *Earl v. De Hart*, 1 Beasley, 280. 'If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains or melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water-course.'" This statement of the law was again quoted with approval by this court in *Schlichter v. Phillippy*, 67 Ind. 201, and in *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192.

The rule is thus stated in Gould on Waters, section 264: "In broken regions of country, intersected by long, deep ravines, or surrounded by high, steep hills or bluffs, down which large quantities of water from rain or melting snow rush rapidly, often attaining the volume of a small river, and usually following a well defined channel, the common law rules applicable to surface water do not necessarily apply. In many respects such waters partake more of the nature of natural streams than of ordinary surface water, and, to a certain extent, are governed by the same rules; and no one has the right to divert such waters, so as to cast them upon the property of others, to their injury." *Kelly v. Dunning*, *supra*; *McClure v. Red Wing*, 28 Minn. 186 (193); *Ramsdale v. Foote*, 55 Wis. 557 (561).

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It is clear, from the authorities cited, that the court did not err in stating the conclusions of law in favor of appellees, nor in rendering judgment on the special finding in their favor. If it were even admitted that the waters were mere surface waters, which the land-owner may fight off his land, if he could, yet if appellant, by said embankment, collected the same on his own land and poured it in a volume on appellees' private road, to their injury, as stated in the special finding, appellees would be entitled to enjoin the same and recover damages therefor. *Davis v. City of Crawfordsville*, 119 Ind. 1, and cases cited; *Patoka Township v. Hopkins*, 131 Ind. 142; Gould Waters (2nd ed.), section 271.

There is no error in the record.

Judgment affirmed.

JORDAN, J., took no part in the decision of this cause.

Filed November 26, 1895.

NOTE.—When swales and ravines are regarded as water-courses, is the subject of a note to the Iowa case of *Wharton v. Stevens*, as reported in 15 L. R. A. 630.

No. 17,399.

ENGRER v. OHIO AND MISSISSIPPI RAILWAY CO.

APPELLATE PROCEDURE.—*Correct Result Reached.*—*Practice.*—*Trial.*

—The withdrawal of a case from the jury, and rendering judgment for defendant, without any finding of either court or jury, instead of directing the jury to return a verdict for defendant, although error, is not cause for reversal where the correct result is reached.

RAILROAD.—*Highway Crossing.*—*Contributory Negligence.*--*Damages.*

One who drives at a trot towards a railway crossing, without looking until his horse's head runs against a passenger coach, which he might have seen before reaching the track if he had looked, is guilty of such contributory negligence as will prevent a recovery.

142	618
144	458
144	695

142	618
159	134

Engler v. Ohio and Mississippi Railway Co.

From the Clarke Circuit Court.

Voigt & Stotsenburg, for appellant.

J. Harmon, E. W. Strong, C. L. Jewett and *H. E. Jewett*, for appellee.

MCCABE, J.—The appellant sued the appellee in the Clarke Circuit Court, to recover damages sustained by him for a personal injury and injury to his horse and wagon, alleged to have been sustained by him through the alleged negligence of the appellee.

After the appellant had introduced his evidence and rested his cause, and without the introduction of any evidence for the defense, on motion of the appellee, the court withdrew the cause from the jury over the appellant's objection and exception and entered judgment in favor of the appellee that the plaintiff take nothing by his suit, and that the appellee recover judgment for costs over appellant's motion for a new trial.

Error is assigned on the action of the trial court in withdrawing the case from the jury, overruling appellant's motion for new trial and entering judgment for the appellee on the evidence. The substance of the evidence, as to appellant's freedom from negligence, is that on April 18, 1889, the appellant was driving a horse attached to a covered spring wagon down a long hill over a hard turnpike road in Clarke county. At the foot of the hill the turnpike crosses the main track of the appellee's railway. The appellant drove his horse in a trot against one of the passenger trains which was running over the crossing at a speed of about thirty miles an hour. The horse's head struck the side of the first or second passenger coach in the train. The horse was necessarily injured, the wagon was overturned and the occupants thrown out some distance, including the appellant, inflicting some personal injury.

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It is down grade on the pike all the way to the track. The pike was hard and smooth and in very good condition. The pike runs in a southerly direction and so does the railroad track. The appellant was traveling in a southerly direction. The train was also coming in a southerly direction. Before starting down the hill, a train can be seen on the railroad coming south a long distance, probably a half mile or three quarters. "The hill is from 130 to 150 feet long. When within fifty feet of the track a train coming from the north could possibly be seen 100 yards north of the crossing. The nearer the track you approach the further up the track you can see. The crossing is on a down grade coming towards Jeffersonville. When within twenty feet of the crossing you can see a train coming from the north three or four miles. When you get within fifty or sixty feet of the crossing, you can see a train coming from the north possibly fifty yards away, and in twenty feet of the crossing you can see a train to the north three or four miles. If one in a wagon stopped within twenty feet of the crossing and would look to the north toward Charlestown he could see a train approaching from that direction for more than a mile." And that was the condition of affairs there when the collision occurred. The appellant was well acquainted there and had frequently passed there before. When appellant got half way down from the top of the hill, by looking to his right he could have seen the approaching train; that is, he could have seen the smoke stack of the locomotive. He could have seen the approaching train for a distance of seventy-five yards of the way down the hill. He just came right along there in a trot without stopping until he came in collision with the cars. He was in a covered wagon with side curtains which were up. There was a

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colored boy with him in the wagon who sat on the seat to appellant's left. Engrer was sitting on the right next to the railroad and he was driving the horse. Nolan "hollered" at him when he was about half way down the hill from the top to the crossing. Threw up his hand and "hollered" once or twice. He "hollered" "ha!" and threw up his hands to attract his attention. He was in view if Engrer had been looking toward him. He was to Engrer's left as he came south down the road. Witness heard the whistle while in his front door. Saw Engrer a short time after he heard the whistle not more than a minute. The colored boy in the wagon testified that they were trotting along very slowly. "We were looking ahead of us. The front part of the first car struck the horse's head first; then the horse jumped around sideways and threw the wagon right up against the edge of the car; I fell out over the side of the wagon and Engrer fell out there."

Engrer testified in substance: I was on my way back, the curtains were rolled up; could see out either side; horse went a slow trot. I was looking in front of me because I knew the crossing was in front of me. Was looking there to see if any train was coming, when I didn't, honestly, see or hear anything until I see my horse tumble over and then the wagon broke down and I fell down with it. I had hold of the line of the horse when he got up. The side of the train struck my horse.

"Quest. Which way were you looking just before and at the time the train struck you? Ans. Right ahead of me at the horse. I always look at the horse when I travel.

"Quest. Did you or did you not hear any whistle? Ans. I did really not hear any or I should have stopped, for I am careful. I never did want to get

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hurt. Did not hear any bell. I never tried to beat a train, never did. I drove past there before. I didn't know the depth of the cut. I have been there, passed there often, but not about train time.

“Quest. When you commenced going down hill, how long did you keep looking for it (the train)? Ans. I looked straight ahead; I know I am compelled to see it if she comes around the cut.

“Quest. Now you say you commenced looking for the train when you got to the top of the hill? Ans. Yes, sir.

“Quest. How long did you keep that up? Ans. Kept it up until I see my horse tumble and then me right after it. Looked straight ahead. Could see ahead of me a good ways, but couldn't see back of me. Could see a good distance up the road. I was looking on the right side where she is to come—I was looking toward the right side. I had the line in this hand, and sat right in that position with my hand on this knee, and looking like this way (indicating).” The court: “Looking down the pike to the crossing?” “No, I was looking more to the right. I was looking to the right; I knowed she comes from the right. I was listening. I looked so if the train would come out there I would see it quick enough to turn my horse to get out of the way. There is no distance at all to turn, there is plenty of room there on the left, the pike is there, and before I knowed anything, out she shot, and down went my horse, and me after it, and that is the last I remember.”

On cross-examination, he testified in substance as follows: “Went in a slow trot down the hill, didn't see the train until the side of the passenger car struck my horse.

“Quest. The cut there is so you couldn't see the train until it got nearly out? Ans. No, sir; I couldn't.

“Quest. You were looking at the end of the cut to see

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when it came out? Ans. Oh, yes, I was watching for it close. I have frequently passed there, and I always watch."

The duty and obligation of appellant was fixed by law, and may be summarized as follows:

1. The presence of the railroad which he was about to cross was notice to him of danger.

2. It was his duty to exercise ordinary care and caution in approaching the crossing to avoid injury to himself.

3. It was his bounden duty to listen for approaching trains.

4. It was his duty to look both ways for approaching trains, a sufficient length of time before venturing upon the crossing, to enable him to avoid a collision, if the surroundings are such as to enable him to see an approaching train.

5. If the surroundings were not such as to admit of his seeing both ways until he arrived at a point near the crossing, it was his duty when reaching such point to look both ways for approaching trains.

6. Without regard to the question of the appellee's negligence, the appellant must affirmatively show that he did not contribute to his own injury by neglecting to observe and perform some one, or more of the above enumerated duties, or he cannot recover.

7. His injuries were *prima facie* the result of his own negligence; that is to say, where one person is injured by a collision with a train of cars, it is *prima facie* the result of his own negligence. And before he can recover, though the railroad company be ever so negligent, he must affirmatively establish that his own negligent failure to perform his duty, did not contribute to bring about his own injury. *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25; *Bellefontaine R. W. Co.*

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v. *Hunter*, 33 Ind. 335; *St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 65; *Terre Haute, etc., R. R. Co. v. Clark, Admr.*, 73 Ind. 168; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Greene, Admx.*, 106 Ind. 279; *Connor v. Citizens' St. R. W. Co.*, 105 Ind. 62; *Mann v Belt R. R., etc., Co.*, 128 Ind. 138; *Louisville, etc., R. W. Co. v. Schmidt*, 134 Ind. 16; *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39; *Lake Erie, etc., R. W. Co. v. Stick*, 41 N. E. Rep. 365; *Smith v. Wabash R. W. Co.*, 141 Ind. 92.

The appellant's evidence fails to establish several of the duties incumbent on the plaintiff, which failure it appears clearly contributed to the production of his injuries.

True, he says, he watched for the train closely, and yet he says that he never saw it until his horse's head ran against the side of the passenger car on the crossing. He gives no reason why he failed to see it sooner. He says he looked to the right, but he does not say he looked to the north, the direction from whence the train was approaching. Indeed his own testimony, as well as that of his other witnesses, affirmatively shows that he wholly failed and neglected to look to the north. And it appears from the testimony of his other witnesses that he could have seen the approaching train by looking in that direction for at least half of the way down the hill, or for a distance of seventy-five yards. And it further appears that when within fifty feet of the crossing he could have seen the approaching train fifty yards away from the crossing, and when within twenty feet of the crossing he could have seen a train in that direction on the track anywhere within three or four miles of the crossing if he had looked to the north. And yet he shows that he drove along in a trot, and never looked in that direction. It is

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very evident that he never thought of the train until his horse's head ran against the side of one of the passenger coaches. His whole conduct shows a remarkable case of gross negligence on his part directly contributing to his injury. No matter how negligent the appellee may have been, he must affirmatively prove that his negligence did not contribute to his injury. But he affirmatively proves the direct contrary. He thus shows that he had no cause of action against appellee.

But it was error to withdraw the case from the jury and render judgment for the defendant without any finding of either court or jury. *City of Plymouth v. Milner*, 117 Ind. 324. If the appellee thought the plaintiff's evidence made no case against it, the proper remedy was to ask the court to direct the jury to return a verdict for the defendant. And that is what the court ought to have done in this case, and then rendered judgment on that verdict for the defendant. Issues of law are tried by the court and issues of fact are tried by the jury or by the court sitting as the trier of the issues of fact. The trial of the issues of fact is for the purpose of ascertaining what the facts in issue are. Until that is done no judgment of the law can be pronounced regularly, because the facts are as yet unknown.

But, as we have seen, the correct result was reached, though irregularly and by an erroneous procedure.

The statute requires us, in every stage of the case, to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and the statute forbids the reversal of a judgment for such error or defect. R. S. 1894, section 401, (R. S. 1881, section 398).

And it is further provided that no judgment shall be reversed for any defect in form, variance, or imperfections contained in the record, pleadings, etc.,

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or other proceedings therein, which by law might be amended in the court below, but such defects shall be deemed to be amended in the supreme court; nor shall any judgment be reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below. R. S. 1894, section 670 (R. S. 1881, section 658).

The correct result having been reached by the trial court without injuriously affecting the substantial rights of the appellant, and the merits of the cause having been fairly tried and determined therein, the statutory provisions referred to require us to affirm the judgment.

Judgment affirmed.

Filed November 26, 1895.

No. 17,583.

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142 686
153 186
153 664

ESTOPPEL.—*Married Woman.*--*Equitable Owner of Land.*—*Legal Title in Husband.*--A married woman who is the equitable owner of a tract of land, the title to which she knows to be in her husband, is estopped to set up her ownership as against creditors of the husband, who gave the credit on the faith of his ownership of the land.

BURDEN OF PROOF.—*Action to Set Aside Conveyance as Fraudulent.*—Defendants in an action to set aside a conveyance as fraudulent have the burden of proving payment of judgment alleged in the complaint to be due and unpaid at the commencement of the action.

PLEADING.—*Complaint.*—*Action to Set Aside Conveyance as Fraudulent.*—*Husband and Wife.*—A complaint in an action to set aside as fraudulent a conveyance to the grantor's wife, alleging that at the time of the conveyance the latter knew of her husband's indebtedness and of his purpose to defraud his creditors, and that she received the conveyance with the purpose to aid him in such fraud, is sufficient without an allegation that there was no consideration.

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SAME.—Complaint.—To Set Aside a Conveyance as Fraudulent.—A complaint in an action to set aside a conveyance as fraudulent, alleging that at the time of the said conveyance the grantor had no other property subject to execution, “nor has he had from the time of said conveyance until now, for the payment of said judgment,” is sufficient, after judgment, to show that such grantor did not at the commencement of the action have sufficient property subject to execution to pay the claim.

TRUST.—Married Woman.—Equitable Title to Land.—Deed in Husband's Name.—A married woman is, as between herself and husband, the equitable owner of an entire tract of land purchased with the understanding that the deed should be taken in her name, on which she made a cash payment of one-fifth the purchase-price, and subsequently paid the balance, where the deed was taken in her husband's name without her knowledge and consent, although he alone signed the purchase-money notes and a mortgage on the land securing the same.

From the Wells Circuit Court.

Sharp & Sturgis, for appellants.

J. K. Rinehart and *M. W. Walbert*, for appellees.

HOWARD, J.—This was an action by the appellees to set aside as fraudulent a conveyance of real estate from the appellant, John S. Pierce, to his wife, the appellant, Sarah M. Pierce. The court found the conveyance fraudulent as to the undivided four-fifths of the land, and judgment was entered accordingly.

It is contended that each paragraph of the complaint is defective for want of an allegation that, at the time of the bringing of the action, the appellant John S. Pierce did not have sufficient property, subject to execution, to pay appellees' claim. The allegation made is, “That at the time of said conveyance, John S. Pierce had no property subject to execution, nor has he had, from the time of said conveyance until now, for the payment of said judgment.” The allegation might, perhaps, have been more definite; but we think that the

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meaning is sufficiently clear, that John S. Pierce had not, either at the time of the conveyance, or at any time since, or at the beginning of the action, sufficient property subject to execution to pay the debt. The complaint may have been subject to a motion to make more specific, but after the finding of the necessary facts, it may be considered sufficient in this particular.

It is further contended that the second paragraph is insufficient for want of an allegation that the conveyance was made from the husband to the wife without consideration. The paragraph, however, does allege that, at the time of the conveyance, Sarah M. Pierce knew of the fact of her husband's indebtedness, and of his purpose to defraud his creditors, and that she received the conveyance with such knowledge and with the purpose to aid him in the perpetration of such fraud. This was sufficient. *Roberts v. Farmers', etc., Bank*, 136 Ind. 154, and cases cited.

It is also claimed that the court erred in its conclusions of law on the facts found.

From the special finding it appears, that the appellants are husband and wife; that the land in question was purchased with the wife's money, with the understanding by her that the deed should be taken in her name, but that it was taken in her husband's name, without her knowledge or consent; that a cash payment of one-fifth of the purchase-price was paid by her; that the remaining part of the purchase-price was evidenced by the promissory notes of her husband, secured by mortgage on the real estate, the husband alone signing the notes and mortgage; that all the purchase-price notes were paid by the wife out of her own money, but before making such payments she knew that the deed had been taken in her husband's name; that she always claimed to be the owner of the land, and frequently asked her

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husband to deed the same to her, but that the deed remained on record in the husband's name, from August 11, 1875, to January 20, 1894, at which last date the deed here sought to be set aside was made from the husband to the wife; that on October 1, 1881, John S. Pierce borrowed two hundred dollars from the school fund, giving as security his mortgage on said land, in which mortgage his wife joined, which mortgage debt was renewed by appellants on November 30, 1891; that in the spring and summer of 1893, at various dates named, John S. Pierce became indebted in the several sums, and to the persons, as the same are set out in the findings, representing to each of said persons that he was the owner in his own right of the said real estate; that none of said persons had any knowledge that his wife had or claimed any interest therein; that in May, 1893, the appellees, Godfrey and Frederick Ashbaucher, bought one of the notes, embracing a part of said indebtedness, for two hundred and thirty-six dollars, said note being signed by the appellant, John S. Pierce, and his brother as principals, and by the appellee, Benjamin F. Hower, as surety; that at the time of the purchase of said note, John S. Pierce informed said Ashbauchers that he was the owner of said real estate in his own right, and they had no knowledge that his wife claimed any interest therein; that on March 12th, 1894, Ashbauchers recovered judgment on said note against John S. Pierce and his brother, as principals, and the appellee, Hower, as surety, it being provided in the decree that the property of the Pierces should be exhausted before resorting to that of Hower; that when John S. Pierce made to his wife the deed here sought to be set aside, January 20, 1894, she had full knowledge of the existence of the debt of her husband to the Ashbauchers, and that he would not have, and did not have, any property subject

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to execution to pay said debt; that at the time of such conveyance neither John S. Pierce nor his brother had, nor has either of them since had any property subject to execution other than said land, out of which said debt might be paid; that the conveyance from John S. Pierce to his wife was without consideration, except as to the undivided one-fifth of said land, and as to the undivided four-fifths thereof was made with knowledge and purpose on the part of both to delay, hinder, and defraud appellees and other creditors of John S. Pierce.

The conclusions of law were: (1) That the appellant, Sarah M. Pierce, is the owner in fee simple of the undivided one-fifth of the land, and (2) that as to the undivided four-fifths the conveyance to her by her husband was fraudulent and should be set aside.

We think the facts found show that, as between John S. Pierce and his wife, she is the equitable owner of all the land in question, and that the deed of August 11, 1875, should have been made to her. The land was wholly paid for by her, and she was unwilling at any time that the title should be in her husband. The fact that her husband signed the purchase notes and mortgage is not material. The mortgage was on her land and she herself paid the notes.

The finding that as to the undivided four-fifths of the land, the deed by John S. Pierce to his wife was without consideration; was but a conclusion. The facts show that the land was all hers, and that as between her and her husband, his deed but gave her the legal title to that which in equity was already her own. All that is needed to make his deed to her absolutely good is the payment of the debts contracted by him in fraud of creditors while the legal title was in his name, she being estopped by her representations from now denying

as to such creditors the validity of the deed then held by him. *Kitts v. Willson*, 140 Ind. 604.

The facts found show that for nearly eighteen years, or from the payment of the first purchase-money note, due August 11, 1876, until the deed in suit was made to her, January 20, 1894, Sarah M. Pierce knew that the deed to her land showed upon its face that the land was owned by her husband; and yet, during all this time, she suffered the title to remain on the public records in his name, joining also with him in the execution of mortgages upon the same as his land, thus representing to the whole world that the land belonged to him and not to her, and allowing innocent persons to become his creditors on the faith that he was, in reality, the owner of the land.

Of course, as to her husband and his heirs and devisees, she may still assert her title to all the real estate, but as against such creditors she is in equity estopped to set up her ownership of any of the land, except it be as to her inchoate interest in the undivided one-third thereof.

As well said by Judge Elliott, in *Hirsch v. Norton, Admr.*, 115 Ind. 341: "Where a party, by clothing another with all the legal *indicia* of ownership, enables him to mislead others, he, and not those who are misled by his acts, must be the sufferer. If loss comes, the man who invested the debtor with the evidence of absolute title, and thus misled creditors, must bear it, and not the creditors. The conclusion we assert involves little more than an application of the familiar general principle, that where one of two innocent persons must suffer by the act of a third, he must suffer who put it in the power of the third to do the act." The case before us is even stronger; for Sarah M. Pierce is not an innocent party, but herself participated in the fraud against her

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husband's creditors. See further, *Minnich v. Shaffer*, 135 Ind. 634; *Le Coil v. Armstrong-Landon-Hunt Co.*, 140 Ind. 256; 7 Am. and Eng. Ency. of Law, 12.

One of the contentions of counsel for appellant is, that the special findings are insufficient, for the reason that it is nowhere shown that John S. Pierce was indebted to appellees at the time of bringing this action.

It is shown that said appellant became indebted to various persons during the year 1893, and that the appellees reduced one of the debts to judgment March 12, 1894.

It was alleged in the complaint, that at the beginning of the action the debts were due and unpaid. There was no answer of payment. It was for the appellants to aver and prove payment, if payment were made. As said in *Hubler v. Pullen*, 9 Ind. 273: "The complaint, it is true, ordinarily avers that the instrument sued on has not been paid; still, proof of that averment is not required, and, therefore, it is not put in issue by a general denial." See, also, *Baker v. Kistler*, 13 Ind. 63.

The conclusions of law were more favorable to appellants than they were entitled to.

The judgment is affirmed.

Filed November 26, 1895.

No. 17,604.

MILLER v. PREBLE, ADMINISTRATOR, ETC.

APPELLATE PROCEDURE.—*New Trial*.—*Affidavits*.—*Record*.—Alleged error in denying a motion for a new trial will not be considered on appeal, where affidavits filed in support of such motion are not brought into the record by order or bill of exceptions.

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DEPOSITION.—Evidence.—Rebuttal.—Payment.—Depositions containing evidence tending to rebut evidence given by defendant under a plea of payment may be read to the jury in rebuttal.

SAME.—As Evidence in Rebuttal.—Abuse of Discretion.—Permitting depositions embracing evidence in chief only to be read in rebuttal is not necessarily an abuse of discretion.

EVIDENCE.—Parol.—Of Statements Made on Examination and Taken Down in Shorthand, and Signed by the Party.—Parol evidence is admissible of statements made by one of the parties in an examination which was taken down in shorthand only, and does not appear to have been taken before an authorized officer, although it was signed by such party.

WITNESS.—Refreshing Memory from Shorthand Notes.—A witness may refresh his memory by reference to shorthand notes of an examination of one of the parties before a person whose official character is not disclosed, where he afterwards states that independently of such notes he remembers that the statements made therein were made by such party on examination.

From the Howard Circuit Court.

D. A. Wood and Blackledge & Shirley, for appellant.

J. F. Morrison, C. M. Pollard and Bell & Purdum, for appellee.

JORDAN, J.—Appellee instituted this action against appellant, to recover a money judgment, and to enforce a vendor's lien against the real estate described in the complaint.

A trial, by jury, resulted in a verdict in favor of appellee, and over appellant's motion for a new trial judgment was rendered for the amount assessed by the jury, and for a foreclosure of the lien in question.

The first contention of appellant's learned counsel is, that there was error in the trial court, allowing one John Ingles, a witness in behalf of appellee, to testify relative to certain statements made by appellant in a former examination. This question is not clearly pre-

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sented by the record, for the reason that the objections and exceptions interposed by appellant to the evidence, and the ruling of the court thereon, are so irregular and in such confusion in the bill of exceptions as to leave the question in doubt as to what were the grounds of the objections made. It may be said to appear, however, from the statements of Ingles, when on the witness-stand, that he was a stenographer, and that previous to the trial he had acted in that capacity, in taking down in shorthand notes an examination of appellant, had before one Jacob Kroch, whose official character, if any, is not disclosed. Appellee, for the purpose of impeachment, sought to prove by this witness, that the appellant had, upon the occasion of this examination, made statements upon certain material points which were different from those made by him upon the trial, relative to the same points.

It further appears that the witness, after refreshing his memory by his shorthand notes made by him upon the aforesaid occasion, read therefrom to the jury certain parts of appellant's examination, bearing upon the question involved. The witness stated that after refreshing his memory by these notes he remembered, independently thereof, that the statements which he had read to the jury were those made by the appellant upon said examination. There is no contention that these statements as given to the jury by this witness were not correct.

Under the facts, as far as they are disclosed to us by the record, the court did not err in permitting this witness to thus testify. *Sage v. State*, 127 Ind. 15; *Bass v. State*, 136 Ind. 165.

But appellant's counsel urge and say "That this examination bore the signature of appellant, and was taken under the statute, and if appellee desired to use it

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upon the trial to impeach appellant, as a witness, he ought to have introduced the written examination as an entirety and not in parts." But this latter proposition is not borne out or presented by the record, inasmuch as it does not appear therefrom, that the examination in question was taken before any authorized officer, or that it had been filed as a deposition in court, or that it existed at the time of the trial in any other form than the shorthand notes of the stenographer. Surely if the examination had been taken by appellee, and filed under the statute, and had the latter seen fit to have used it upon the trial to impeach appellant, he could not have been compelled to read the entire deposition to the jury, but would have been permitted to select and read such parts, if he desired, as tended to contradict or impeach the witness upon the material point in question. In this event, however, appellant would have had the right, at the proper time, to have read to the jury so much, or all, if necessary and pertinent, as tended to explain or modify the statements introduced against him, or as tended to show that his testimony on the examination upon the point involved was consistent with the statements made by him upon the trial. *Bass v. State, supra.*

The next alleged error of which appellant complains is that of the court in admitting the depositions of Catherine Earley and W. S. Young, for the reason, as insisted, that these depositions embraced evidence in chief only. The cause was to put at issue by a denial, and plea of payment, and the depositions in controversy seem to contain evidence, which at least tends to rebut that of appellant given under his plea of payment, and therefore they were proper to be read to the jury in rebuttal. But if it were conceded that these depositions were wholly in chief, it however was within the discre-

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tion of the court to admit them at any stage of the trial, and unless an abuse of this discretion, prejudicial to appellant, was properly disclosed by the record, the action of the court in admitting them in rebuttal would not alone constitute reversible error. *Western Union Tel. Co. v. Buskirk*, 107 Ind. 549; *Stewart v. Smith*, 111 Ind. 526.

Appellant's next and last contention is that his motion for a new trial should have been sustained upon the ground of newly discovered evidence.

In support of this cause for a new trial, appellant filed affidavits, but these have not been brought into the record by an order of court or bill of exceptions.

This was necessary in order to present any question to this court, upon an appeal, relative to the newly discovered evidence. *Harper v. State, ex rel.*, 101 Ind. 109.

There is no apparent available error, and the judgment is therefore affirmed.

Filed November 26, 1895.

17.687.

WRIGHT, ADMR., ETC., v. CITY OF CRAWFORDSVILLE.

APPELLATE PROCEDURE.—Instructions Given.—Not Absolutely Incorrect.—Evidence Not in Record.—A judgment will not be reversed on appeal, in the absence of the evidence from the record, for giving instructions which are not absolutely incorrect under any state of evidence.

SAME.—Evidence.—Acts of Drunkenness by Plaintiff's Intestate.—Presumption.—Evidence as to acts of drunkenness on the part of plaintiff's intestate will be presumed, on appeal, in the absence from the record of anything showing the contrary, to have been introduced in rebuttal against evidence to establish an allegation of the complaint that he was a "sober and industrious man."

142	636
153	381
142	636
157	515

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SAME.—*Instructions Refused.*—*Evidence Not in Record.*—Instructions will be presumed on appeal to have been properly refused, although they are abstractly correct, in the absence of the evidence from the record.

EVIDENCE.—*Specific Acts of Intoxication.*—*Mitigation of Damages.*—*Death.*—Evidence of specific acts of intoxication on the part of plaintiff's intestate is admissible in an action for negligently causing his death, in mitigation of damages.

From the Montgomery Circuit Court.

J. Wright, J. M. Sellers, B. Crane and A. B. Anderson, for appellant.

W. T. Whittington and A. D. Thomas, for appellee.

JORDAN, J.—Action by the appellant, in the court below, to recover damages for the death of his decedent, alleged to be due to the negligence of appellee. It appears from the complaint that the decedent was a cabman in the city of Crawfordsville, and that on the night of October 21, 1894, while driving his cab along a street in said city, he drove into a ditch which the city had negligently omitted to properly guard by means of guard rails, etc.; that by reason thereof his cab was overturned and he was thrown into the ditch, and one of the horses attached to the cab fell upon him and broke his neck; that he left surviving him a minor child, and mother and sister depending upon him for support. A trial resulted in a verdict in favor of the appellee, upon which, over appellant's motion for a new trial, judgment was rendered.

The error assigned is the overruling of the motion for a new trial. The record seems to have been framed under the provisions of section 630 of the code of civil procedure, in order to reserve the questions of law decided by the lower court, during the progress of the cause therein, for the decision of this court.

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The contentions of appellant's learned counsel, in the main, are that the court erred in giving and refusing certain instructions and in permitting certain evidence relating to the intoxication of the decedent to be given to the jury by the appellee.

The evidence is not in the record, and there is no statement, of the trial judge in the bill of exceptions, that there was any competent evidence introduced upon the trial material to the points covered by the instructions, as provided by section 650 of the code and rule thirty of this court. Where the evidence is not in the record by a bill of exceptions, and the record in the cause is not properly made up, under the statute or rules of this court, so that we can consider the questions involved which cannot be fully understood and decided without the evidence, we must, as to these questions, presume in favor of the rulings of the lower court thereon. *Indiana, etc., R. W. Co. v. Adams*, 112 Ind. 302; *Bain v. Goss*, 123 Ind. 511; *Shugart v. Miles*, 125 Ind. 445; *Jones v. Foley*, 121 Ind. 180; *Smith v. James*, 131 Ind. 131; section 241, Elliott App. Proc'd.

Controlled by this rule, under the state of the record in the case at bar, we must presume that the instructions refused by the court, over appellant's request, although they may have stated the law correctly in the abstract were not relevant or applicable to any evidence before the jury, and therefore properly refused.

Complaint is also made that certain instructions given by the court on its own motion, and also at the request of appellee, are wrong. But it has been repeatedly held by this court, that where the evidence is not in the record a judgment will not be reversed for giving instructions which would be correct under any evidence that could have been introduced within the issues of the cause. We have examined the instructions given by

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the court, of which appellant complains, but none of them appear to be substantially faulty in the abstract; and, in the absence of the evidence, we cannot adjudge that they were inapplicable to any evidence that might have been given under the issues. *Rapp v. Kester*, 125 Ind. 79, and cases cited.

Another contention of appellant is that the court erred in permitting, over his objections, certain witnesses to testify in behalf of appellee, relative to acts of drunkenness on the part of decedent. This evidence is set out in the bill of exceptions, and it shows that for a period of a year and over prior to his alleged death, he was repeatedly seen in a state of intoxication. The complaint alleged that "The deceased was thirty-eight years old, and that he was a sober and industrious man, in good health and able to earn a livelihood for himself and those dependent upon him." We must presume, in the absence of anything in the record showing the contrary, that appellant introduced evidence tending at least to establish the averment that the decedent was a sober and industrious man, for the purpose of showing that he was more valuable to his dependent family as a protector and in rendering services for their support than if he had been an idle and dissolute person, and that the evidence in controversy was admitted by the court to rebut that given by appellant under the averment in the complaint. See *Wood Railway*, Vol. 3, section 414.

But aside from this presumption, we think that the evidence was legitimate, under the issues, to be considered by the jury upon the question of the amount of damages to be awarded. The repeated acts of drunkenness disclosed by the evidence, tended to prove that the deceased was addicted to the vicious habit of becoming intoxicated to an extent that, had he lived, would

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have tended to impair his ability to earn money and so use it in a manner as would contribute to the proper support of his family. It is a fact generally conceded and recognized, that drunkenness, as a habit, tends to absorb the earnings of the person addicted thereto, and renders him less fit to accomplish that which he might if he were of temperate habits.

In actions of the character of the one under consideration, the jury is authorized, in awarding damages, to take into consideration the pecuniary loss or injury resulting to those most nearly related to the deceased; and it is obvious, we think, that where it is made to appear that the decedent was addicted to the habit of intoxication and in spending his earnings in whole or in part, as the case might be, for intoxicating liquors, the loss resulting from his death to those dependent upon him for support and protection in the future, would not be as great as in a case where it appeared that the deceased was a sober and industrious man. In *Wood on Railroads*, 414, *supra*, in discussing the question of compensation in cases of this kind, it is said: "The business, education, and habits of sobriety and economy of the deceased may be considered." In *Am. and Eng. Ency. of Law*, Vol. 5, p. 128, it is said:

"In estimating such damages the jury may also consider the decedent's personal character, and mental and physical capacity."

In the case of *Nashville, etc., R. R. Co. v. Prince*, 2 Heisk. (Tenn.) 580, the court said:

"In estimating damages sustained by the defendant in error, it was legitimate for the plaintiff in error to show by proof that the deceased was a drunken and worthless man and made no provision for his family. These were legitimate facts to be considered in estimating damages."

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In an action by a father for the seduction of his daughter, the character of the latter, for chastity, prior to her seduction, is involved in the issue upon the question of damages, and proof of particular acts of her sexual immorality or lascivious conduct, is held to be admissible in evidence, in mitigation of damages. See *Shattuck v. Myers*, 13 Ind. 46; *Long v. Morrison*, 14 Ind. 595; *City of South Bend v. Hardy*, 98 Ind. 577; *Field Damages*, section 105; *Abbott Trial Ev.*, Ch. 45, p. 682, section 7, and authorities cited.

These acts, in suits for seduction, seem to be admissible upon the theory, that if the woman was unchaste before her fall, the injury perpetrated by the wrongdoer may be said not to be so great in its results as it would be had she been of a previous chaste character, and the jury may, therefore, and ought to consider the fact of her previous unchastity in mitigation of damages. See *Field Damages*, section 108.

It has been held, also, that in an action upon a breach of a marriage contract, the want of virtue and sobriety in the plaintiff, and dissolute conduct, after her engagement, or before, if unknown to the defendant, may be given in evidence, at least in mitigation of damages upon the ground, also, that an unchaste woman cannot be injured by a breach of the promise of marriage to the same extent as a virtuous one. *Field, supra*, section 108.

While it is true, as a general rule, that the moral character of parties to an action, as parties, is not involved, and, therefore, not relevant in evidence, but there are some well recognized exceptions to this rule. Suffice it to say, however, that there are actions, of which the one at bar is an example, where particular traits, habits, or disposition of a party, or the person whose

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injury or death is the source of the action, may become material to some issue and therefore admissible.

Counsel, however, further contend that the particular acts of intoxication were not competent in evidence, and they cite us to the rule applicable to the impeachment of a witness on character; but they seemingly confuse real character—that which is actually impressed by nature, traits or habits upon a person, with what is generally termed reputed character. Reputation may be evidence of character, but it is not character itself. That which a person really is must be distinguished from what he is reputed to be. Reputed character is said to be the slow spreading influence of opinion, arising out of the deportment of an individual in the society in which he moves, and in admitting this species of character in evidence in actions, for any purpose for which it may be admissible under the rule allowing the same, specific or particular acts of immorality are not generally permitted to be shown.

See Rice Ev., Vol. 2, section 506. As to the distinction made between real and reputed character, see *Lyons v. State*, 52 Ind. 426.

The specific acts of intoxication, upon the part of the deceased, were proper as tending to show, not what was reputed to be a fact, but what was in reality a trait or habit to which he had become addicted, and which had actually impressed upon him its bad effects.

We are, therefore, of the opinion that the evidence in controversy was competent to be considered by the jury upon the question of estimating, or rather in mitigation of, damages in the event they found in favor of the appellant under the issues in the case, and the court did not err in refusing appellant's motion to reject it. A portion of this evidence went to show that the decedent,

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only a few hours prior to the accident, was intoxicated. This part was also proper, perhaps, upon another ground, namely, as tending to prove, as insisted by appellee, that the deceased was in a condition of intoxication when he drove into the ditch, and, therefore, did not exercise due care. There is no available error in the record, and the judgment is therefore affirmed.

Filed November 26, 1895.

No. 17,780.

JONES v. THE CITY OF TIPTON ET AL.

142	643
170	247

PLEADING.—Complaint.—Review of Judgment.—Tax Lien.—A complaint in an action to review a judgment finding that defendant has a valid and paramount lien for taxes on land sold to him in 1887, for delinquent taxes for 1886 and previous years, alleging that delinquent taxes for a specified amount were illegally placed on the city tax duplicate for 1881, is demurrable where it fails to show that such illegal taxes were a part of the taxes for which the land was sold in 1887.

REVIEW OF JUDGMENT.—Complaint.—Material New Matter.—Taxes.—Reasonable diligence in discovering the facts of the illegality of delinquent taxes spread upon a city tax duplicate nine years before the rendition of a judgment sought to be reviewed is not sufficiently averred by an allegation in the complaint that plaintiff made search for the facts, but could not find them in the city or county offices.

From the Tipton Circuit Court.

J. Jones and Oglebay & Oglebay, for appellant.

Waugh, Kemp & Waugh and Beauchamp & Mount, for appellees.

HOWARD, J.—On February 14, 1887, the city of Tipton, through her treasurer, sold the lot described in the

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complaint for delinquent taxes for the year 1886, and previous years, to the appellee, John Akers. Afterwards, in 1890, the appellant brought her action against said Akers to set aside said tax sale to him, and to quiet title to said lot against his said claim for taxes. To this action, Akers, by way of cross-complaint, set up his purchase at tax sale and payment of subsequent taxes on said lot, and asked that in case appellant's title should be quieted, it be so quieted subject to his lien for taxes. The cause was submitted to the court for trial, and it was found that by reason of certain irregularities in the proceedings, the sale should be set aside, but that Akers had a valid and paramount lien in the sum of \$85.20 for the taxes paid by him, and that, subject to such lien, the title of appellant to the lot should be quieted. A decree was rendered accordingly, and the lot ordered sold in satisfaction of the tax lien.

The present action was brought to review the foregoing proceedings and judgment, and the sustaining of a demurrer to the complaint for review is the only error assigned on appeal.

Why the city of Tipton was made a party to the action in review, is not apparent. The appellee Akers was sole defendant in the original action. There was, however, no separate demurrer on the part of the city, and the appeal must be decided on the joint demurrer.

The appeal was taken to the appellate court, but as an appeal from the judgment in the original case would have been to this court, the appellate court held that the appeal from the judgment in review should be to this court. The case was transferred accordingly. *Jones v. City of Tipton*, 13 Ind. App. 392.

The original action was upon the claim by appellant that the lot in question was never a part of the city of Tipton, and, hence, that the taxes, for which it was sold,

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were wholly illegal. The action in review sets up a different theory, namely, while admitting that a part of the taxes are valid, yet that, by reason of material new matter discovered since the rendition of the first judgment, it appears "that said real estate was never assessed for town or city taxes by the said town, now city, of Tipton, Indiana, nor placed on said town tax duplicate, until the year 1881, nor was the same liable for taxation, at which time the valuation of said property for the purposes of taxation was \$265.00, and the rate of taxation for said year \$1.15 on the \$100.00; that on said tax duplicate of 1881, due and collectible in 1882, there is charged up delinquent taxes to the amount of \$35.75 against said property, when in truth, and in fact, said property had never, prior to said year, been assessed for town or city taxes, nor the same placed on the tax duplicate of said city; and that said property was never returned as delinquent, neither by the town of Tipton, nor the city of Tipton, Indiana, as shown by the records of the clerk and treasurer of said city; that no warrant was ever issued by said city for the collection of said tax, no notice was ever given of the placing of said tax on the duplicate for collection, nor was the same liable to taxation prior to 1881."

It is further alleged in the complaint for review, that the foregoing facts were unknown to appellant before the rendition of the original judgment, but that they have since been discovered by an examination of the tax duplicate of 1881.

There is some discussion by counsel as to whether the alleged new facts constitute "newly discovered evidence" which might have entitled appellant to a new trial, under the provisions of section 568, R. S. 1894 (section 559, R. S. 1881); or whether they constitute "material new matter," such as might, under section

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628, R. S. 1894 (section 616, R. S. 1881), entitle her to a review of the judgment against her. We are of the opinion that the facts alleged, if available for any purpose, constitute material new matter, to be set out in new pleadings, and not merely new evidence to be given under the original pleadings. *Nelson v. Johnson*, 18 Ind. 329.

It is very clear that new matter, discovered since the rendition of the first judgment, in order to entitle the losing party to a review of that judgment, must be such matter, as, if alleged in the original pleadings, and supported by the evidence, would have entitled such party to a different judgment. *Simpkins v. Wilson, Admr.*, 11 Ind. 541; *Francis v. Davis*, 69 Ind. 452.

We are unable, however, to perceive how the alleged new facts in this case would, if originally pleaded and proven, have changed the judgment. In the original proceedings it was shown that the lot was sold to the appellee Akers, on February 14, 1887, "for the legal taxes then due on the same." Of the judgment rendered on this tax sale, appellant says, in her complaint for review, "That on the 2nd day of December, 1890, in an action then pending in this court, the defendant, John Akers, recovered a judgment against this plaintiff for the sum of \$85.20, which sum was found due the defendant upon a tax lien held by him, he having purchased the same at a delinquent tax sale, held by the city of Tipton, Indiana."

The new facts alleged show that, as appears on the city tax duplicate for 1881, there were, for that year, illegally placed upon said duplicate delinquent taxes to the amount of \$35.75. What connection there may be between the delinquent taxes of 1881 and those for which the lot was sold in 1887, is not shown. For all that appears, the taxes due in 1881 may have been fully paid

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before any of the delinquent taxes of 1887 had accumulated. While the lot was worth but \$265.00 in 1881, it may, by reason of valuable improvements or by increase of its intrinsic value, have become worth very much more in 1887. Appellant also may have had personal property, whose unpaid taxes might have become a lien on the lot in question. The complaint for review does not show that the illegal delinquent taxes of 1881 were a part of the delinquent taxes of 1887, found to be all legal by the judgment of the court in 1890.

We are, besides, not at all clear, even if the facts alleged were material, that the appellant has shown due diligence in their discovery.

The facts were spread upon the tax duplicate of 1881; it would seem that with very little diligence they might have been there discovered before the rendition of the judgment in 1890. In the original proceedings, the appellant, by a suit to quiet her title, and by injunction, attacked the validity of all the taxes assessed against her lot. We do not think she now shows that she then exercised due diligence in failing to discover the amount and source of these taxes. She says she made search for the facts, but could not find them in the city or county offices. The tax duplicates were public records, which she had a right to examine; and if she was refused opportunity to do so, the process of the court was sufficient to bring up all the public records of both offices. The general claim of diligence is not enough. The facts constituting the diligence used, should be given, that the court may judge of its sufficiency. *Osgood v. Smock*, at last term, and authorities cited.

The judgment is affirmed.

Filed November 26, 1895.

White, Trustee, etc., v. New York, Chicago and St. Louis R. R. Co.

No. 16,657.

**WHITE, TRUSTEE, ETC., v. THE NEW YORK, CHICAGO
AND ST. LOUIS RAILROAD CO.**

EVIDENCE.—Exclusion.—Sparks from Railroad Engine.—Exclusion of evidence as to how a witness knew that sparks emitted from defendant's engine were alive is harmless, if error, where he testifies that he has seen live sparks thrown a specified distance.

INSTRUCTIONS TO JURY.—Negligence.—Railroad.—An instruction which, after stating that the negligence of defendant charged in the complaint consists in its engine being old and out of repair, and not equipped with a proper spark arrester, and also in being negligently and carelessly operated, states that the issue is whether or not the evidence and circumstances preponderate in favor of the proposition that the fire was caused by defendant's negligence "in operating its engine in the manner alleged," is not prejudicial error as confining the negligence to the mere operation of the engine, especially where the jury are elsewhere instructed that defendant would be liable if the fire was caused by the failure to use proper appliances, by suffering them to be out of order, or by negligently operating the engine, or other negligence.

SAME.—Preponderance of Evidence.—Complaint.—An instruction that if a careful consideration of the evidence and circumstances does not create an honest belief "that the allegations of the complaint are true" there is no preponderance for plaintiff, is not objectionable on the ground that it requires plaintiffs to prove all the allegations of their complaint, where from the other instructions the jury must have understood that the plaintiffs were simply required to prove their alleged cause of action by a preponderance of the evidence.

SAME.—Impeached Witness, Testimony Of.—An instruction that the jury have the right to reject all the testimony of a witness who has been impeached by proof that he has made contradictory and inconsistent statements out of court concerning material and relevant matters, is proper under section 515, R. S. 1894, providing for impeachment by such proof.

From the Allen Superior Court.

Bates & Paden, Morris & Barrett and Morris, Newberger & Curtis, for appellants.

White, Trustee, etc., v. New York, Chicago and St. Louis R. R. Co.

S. E. Williamson and Bell & Morris, for appellee.

JORDAN, J.—This was an action by appellant, as trustee, etc., to recover alleged damages in the sum of one hundred and eleven thousand dollars, and over, growing out of the destruction by fire, of a certain factory building, together with a large amount of material and machinery therein contained. The building is designated as “The White Wheel Works,” situated in the city of Fort Wayne, Indiana.

The complaint charges, among other things, as follows:

“That on the eighth day of August, 1890, and for a long time prior thereto, the said defendant’s line of railroad was located, constructed and extended alongside, and immediately south of, and contiguous to, the said buildings, works and property of the plaintiffs above described, and during all said times said railroad was used and operated by the defendant in running its locomotive engines and cars; that on or about the eighth day of August, 1890, the defendant, by its agents and servants, while running and operating its said railroad, and while running a locomotive engine and train of cars thereon, alongside said property above described, and without any fault of plaintiffs, or negligence of plaintiffs contributing thereto, negligently and carelessly set fire to, and caused the destruction of, said property above described, to the amount and value of one hundred and eleven thousand, eight hundred and ninety-three dollars, whereby plaintiffs, John W. White, James B. White, composing Whites’ Wheel Works and American Wheel Company, were damaged in the sum of \$111,890, and the defendant thereby became indebted to plaintiffs in said sum. The locomotive engine attached to and moving said train of cars at said time and place

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was old and out of repair, and was defective in its smoke stack, and not supplied and equipped with the best and well known appliances to prevent the escape of sparks from its smoke stack. It was negligently and carelessly operated, in that the power of said engine was overtaxed by moving too great a number of cars, too heavily loaded, and while approaching and passing said property of plaintiffs, was too heavily and suddenly fired, and worked too hard, and the fire in its fire box shaken up, thereby causing the escape of large quantities of sparks of fire and burning cinders, which were borne and carried by strong winds then blowing from the south, in and upon said buildings, which burned and destroyed the property of plaintiffs."

It is further alleged that the insurance companies have paid the loss incurred by them by virtue of the policies covering the said building, material and machinery, and that they have been subrogated to an extent to the rights of the plaintiffs.

Under the issues joined, there was a trial by jury, and a verdict in favor of appellee, and over appellants' motion for a new trial, judgment was rendered on the finding. The overruling of this motion is the only error assigned. The grounds upon which appellants base their contentions for a reversal of the judgment are: That the court erred in giving the jury instructions number four, six and seven, and in not permitting a witness for appellants in rebuttal to answer a certain question propounded to him, relative to the character of the sparks emitted from appellee's engine.

The fourth charge given by the court on its own motion, and of which appellants' learned counsel complain, is as follows:

"In applying the evidence in the case to the complaint, remember that the complaint charges negligence

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in firing the property alleged to have been destroyed by sparks and cinders carried by the wind upon plaintiffs' buildings, which sparks and cinders were, it is alleged, caused by the negligence of the defendant in this, that the engine was old, worn, and out of repair; defective in smoke stack and spark arrester; not equipped with the best well known appliances to prevent escape of sparks from the smoke stack; that it was negligently and carelessly operated, in that it was overtaxed with too heavy a load, and that when approaching plaintiffs' property it was too heavily and suddenly fired, and worked too hard, and its fire-box shaken up, causing escape of sparks and cinders, destroying plaintiffs' property.

“Does the evidence and circumstances in the case preponderate in favor of the *proposition that the fire was caused by the negligence of the defendant in operating its engine in the manner alleged, or does the evidence fail to show that the fire was caused as alleged. This is the issue.*”

The contention is that the latter part of this instruction, which we have indicated by the *italics*, is misleading upon the issues in the cause. They insist that the words, “or does the evidence fail to show that the fire was caused as alleged, * * manifestly meant, and were intended to mean, and were so understood by the jury to mean, a negative suggestion as to whether the evidence did not fail to preponderate in favor of the proposition immediately preceding. They further urge that when the closing words of the charge ‘*This is the issue,*’ are considered, ‘it is evident that the court intended to limit the jury to the inquiry alone as to whether the engine was negligently and carelessly operated, in that it was overtaxed with too heavy a load, and when approaching plaintiffs' property it was too heavily and suddenly fired, and was worked too hard, and

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its fire-box shaken up, causing the escape of the sparks and cinders which fired plaintiffs' property;' that the statement as made by the court in the charge, excluded from the jury the fact that a sufficient and proper spark arrester might be considered in determining whether or not the engine was negligently operated; that one of the grounds upon which appellants sought to recover was that appellee had failed to provide the engine with a proper spark arrester."

In the first part of the instruction the court seems to have substantially stated all the material negligent acts alleged against appellee, which coupled together apparently constitute the *gravamen* of the complaint. After reciting the alleged acts, substantially as charged in the complaint, the court closed the instruction with the part or paragraph upon which appellants found their objections, namely, "Does the evidence and circumstances in the case preponderate in favor of the proposition that the fire was caused by the negligence of the defendant in operating the engine *in the manner alleged*, or does the evidence fail to show that the fire was caused, *as alleged*. *This is the issue*." The *italics* are our own. The charge in controversy, under a well-settled rule, must be viewed as an entirety and not by detached parts or clauses, and when so considered and applied to the cause of action as alleged, it is obvious, we think, that it is not open to the objections urged against it by counsel. An examination of the complaint discloses that the negligence of which appellants complain consisted of appellee using or operating an engine, old and out of repair, and not equipped with a proper spark arrester as averred, and while heavily loaded and in the condition mentioned while approaching and passing appellants' property it was carelessly operated and the fire in its box shaken up, etc., thereby causing the escape

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of a large quantity of sparks of fire, which ignited and burned appellants' building. It is therefore evident that the defective condition of the engine, coupled with the alleged facts showing the manner in which it was operated by the appellee at the time, formed the basis of the cause of action. Consequently, if we consider the charge in its application to the cause of action set forth in the complaint, the words, caused by the negligence of the defendant in operating its engine in the manner alleged, included all the issuable facts constituting the negligence of which appellants complained and the words could not, in reason, be interpreted as excluding from the jury the insufficiency of the engine in respect to its not being equipped with a proper spark arrester.

We cannot indulge in the presumption that intelligent jurors could have been misled by this part of the charge, or given to understand that their investigation was limited to a part only of the constituent facts in issue. But if it should be conceded that this instruction was not as clear, explicit, or specific in its terms, in defining appellants' right of recovery as it ought to have been, we are of the opinion, that the infirmity thereof, in this respect, at least, was cured by another of the court's instruction, wherein it was substantially stated that if the fire was caused by a failure to use such appliances, or by suffering them to be out of order, or by negligently operating the engine, or other negligence, then the appellee would be liable for the consequences. This latter charge surely is as broad in its terms as appellants could desire. Considering the instructions along with the entire series given by the court, on its own motion, and also at the request of the respective parties, we are satisfied that the jury was fully and properly advised upon all of the questions at issue in the cause, and as to the law applicable thereto, and that no error prejudicial to

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appellants' material rights in the case could have resulted from the giving of the charge in controversy.

Instruction number six, which appellants condemn, is as follows :

“The credit of a witness may be impeached by proof
“that he has made statements out of court contrary to,
“and inconsistent with, what he testifies on the trial
“concerning matters material and relevant to the issues
“joined, and when such witness has been thus impeached
“about matters material and relevant to the issues, the
“jury have the right to reject all the testimony of such
“witness, except in so far as the witness has been cor-
“roborated by other credible evidence in the cause.”

Counsel say that this instruction does not embrace a correct statement of the law relative to the right of the jury to reject the testimony of a witness who has made statements out of court, which are contrary to, and inconsistent with, material evidence given by him upon the trial. Their further contention is that the court's statement that they had the right to reject the testimony, was equivalent to saying to them, that it was their duty to do so. The statute recognizes the rule that a witness may be contradicted or impeached by showing that he has made statements out of court different from what he has sworn to upon the trial. Section 515, R. S. 1894 (section 507, R. S. 1881). The term impeach, in its legal definition, when used in reference to a witness, signifies to discredit, or to show or to prove that he is unreliable, or unworthy of belief. As a general rule, where there is no impeaching or discrediting evidence appearing or shown in the case against a witness, the jury should not arbitrarily disregard his evidence. But where he has been successfully impeached, and his evidence has not been either in whole or in part corroborated by other

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credible testimony in the cause, it is within the province of the jury or court trying the issues to entirely disregard his testimony. While it is correct that the law does not require that jurors who believe the evidence of an impeached witness, in the particular instance to be true, shall nevertheless reject it; still we know of no rule which demands that a jury or court shall consider or accept the testimony of one, which under all the circumstances, or evidence in the case, they believe to be either unintentionally or wilfully false. Tested then by the principles of law which we have stated, how stands the charge in controversy?

The jurors in the case at bar were advised in a general way thereby, that the credit of a witness may be impeached by proof that he has made statements out of court contrary to, and inconsistent with, what he testified to on the trial, concerning matters material and relevant to the issues joined, etc. The force and effect of the instruction was but to inform the jury that one of the legally recognized modes of impeachment of a witness, was by showing statements relevant and material to the issues, made by him, and which were contrary or inconsistent with those sworn to by him upon the trial; and when impeached in this manner, that it was within the province of the jury to disregard or reject all of the testimony of such witness except so far as he has been corroborated by other credible evidence. We fail to see anything in the charge of which appellants have a right to complain, or which militates against any principle of law to their prejudice. *Seller v. Jenkins*, 97 Ind. 430.

An instruction upon impeachment of witnesses, not as full and complete as the one under consideration, was upheld by this court in the case of *Harper v. State*, 101 Ind. 109. See also *Smith v. State*, 142 Ind. 288.

Denke-Walter v. Loeper et al.

MONKS, J.—Ida M. Loeper, one of appellees, brought this action against her co-appellees and appellant to quiet title to real estate.

Cross-complaints were filed by certain of the appellees to quiet title to a part of the same real estate.

The cause was tried and judgment rendered quieting the title to said real estate, as prayed for in the complaint and in the cross-complaint. Judgment was also rendered against appellants, Mary C. Denke-Walter and Frederick W. Denke-Walter (who is made an appellee in this court) for costs.

It is settled law in this State that all joint-judgment defendants in the court below must be made co-appellants in this court in all vacation appeals or the appeal will be dismissed for want of jurisdiction. Acts 1895, p. 179; Elliott App. Proced., section 144; *Inman v. Vogel*, 141 Ind. 138, and cases cited; *Walsh v. Brockway*, 13 Ind. App. 70.

There can be but one appeal from the same judgment, and when the same is not a term time appeal all co-parties entitled to appeal must be joined as co-appellants. Acts 1895, p. 179; *Inman v. Vogel*, *supra*; *Gregory v. Smith*, 139 Ind. 48, and cases cited.

The appeal in this case was not a term time appeal and is not therefore governed by the provisions of the acts approved March 9, 1895. Acts 1895, p. 179.

Frederick W. Denke-Walter was a co-party and joint-judgment defendant with appellant in the court below, and should have been made co-appellant in this court. This not having been done the appeal must be dismissed. *Gregory v. Smith*, *supra*; *Inman v. Vogel*, *supra*, and cases cited; *Midland R. W. Co. v. St. Clair*, 42 N. E. Rep. 214.

The appeal is therefore dismissed.

Filed December 10, 1895.

The Bedford Belt Railway Co. v. Brown.

No. 17,450.

THE BEDFORD BELT RAILWAY CO. v. BROWN.

CONTRIBUTORY NEGLIGENCE.—*Appellate Procedure.*—Contributory negligence on the part of plaintiff in an action for personal injuries will not be presumed where the complaint is attacked on appeal by an assignment of error in overruling defendant's motion in arrest of judgment, but no facts are alleged indicating that plaintiff was negligent, and there is an allegation that he was not negligent.

APPELLATE PROCEDURE.—*Complaint, Sufficiency Of.*—A complaint will not be held insufficient as against an objection first made on appeal, where it contains enough to bar another action.

MASTER AND SERVANT.—*Assumed Risk.—Construction of Railroad Bridge.*—An employe engaged in building a railway bridge, who knows that wedges used in the construction of a track on which heavy timbers are conveyed are liable to slip out of place, assumes the risk of injury from that cause.

SAME.—*Assumed Risk.—Construction of Railroad Bridge.*—An employer is not liable for an injury to an employe engaged in constructing a railroad bridge, caused by the slipping out of a wedge used in the construction of a track on which to convey heavy timbers, where the employe participated in the construction of the track and in the placing and use of the wedges, and knew of their liability to slip out.

SAME.—*Contributory Negligence.—Construction of Railroad Bridge.*—An employe engaged in constructing a railroad bridge is guilty of contributory negligence in failing to observe whether a wedge used in the construction of a track on which heavy timbers are conveyed, is out of place, so as to render the track unsafe, before attempting to convey such timber over it, where he knows that the wedge is liable to slip out of place.

From the Lawrence Circuit Court.

F. M. Trissal, for appellant.

Dunn & Lowe, for appellee.

HACKNEY, J.—This appeal is from a judgment, in favor of the appellee, for personal injuries sustained while employed by the appellant in the construction

142	659
142	597
143	385

142	659
149	24
152	400

142	659
156	181

142	659
159	668

142	659
164	516

142	659
166	275

142	659
169	682

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of a railway bridge. The complaint charged that the appellee was employed in the construction of said bridge; that when about one hundred feet had been nearly completed, and several bents had been placed in position, boards were laid on either side, along the top, for the workmen to walk upon. "Between said running boards, on the top of said bridge and along the middle of it, from bent to bent, were laid two lines of stringers, side by side, and on the top of these stringers, lengthwise of them and of the bridge as well, were laid consecutively heavy planks, end to end," to be used as a track, upon which to move, from place to place, heavy timbers for the construction of the bridge; such timbers being so moved upon said track by means of a small, solid frame twelve inches square, with an iron roller adjusted beneath, and called a "dolly." It was averred that the appellant negligently and carelessly constructed said track, and negligently permitted the same to become and remain in an unsafe and infirm condition, unbraced, unsupported, and not properly leveled, and which condition was well known to appellant, and unknown to appellee, and which could and should have been repaired; that while he and other workmen were moving a large timber along said track, upon said "dolly," the appellee walking along one of the board walks so made along the top of said bridge, said "dolly" and the timber thereon, by reason of said defects in said track, became unbalanced, and fell from the bridge, hurling the appellee to the ground below, and inflicting the injuries complained of. It was alleged, also, that the appellant was guilty of no fault or negligence contributing to said injury.

There was no demurrer or motion addressed to the complaint in the lower court, and its sufficiency is

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attacked here upon an assignment of error that the court overruled appellant's motion in arrest of judgment.

Appellant's learned counsel attack the complaint under the fellow-servant rule, the rule as to the assumption of the ordinary and the extraordinary risks of the service, and the rule as to contributory negligence. Where there is enough in a complaint to bar another action, it is sufficient against an attack first made in this court. *Harris v. Wright*, 123 Ind. 272; *Peters v. Banta*, 120 Ind. 416; *Chapell v. Shuee*, 117 Ind. 481; *Sims v. Dome*, 113 Ind. 127; *Donellan v. Hardy*, 57 Ind. 393. After verdict all intendments are taken in favor of the pleading, and the same rule applies where the attack is by motion in arrest, as where it is made for the first time upon assignment in this court. *Colchen v. Ninde*, 120 Ind. 88, and cases there cited. See also Elliott App. Proced., section 473.

We cannot presume, as counsel urge, that the appellee knew of the defects, in the face of the allegation that he did not know of them. Without such knowledge, there could be no assumption of the hazard as an extraordinary risk of the service. If we accept the rules above suggested, we cannot presume that the appellee had participated in the construction of the track, or that he was a fellow-employee of those who did construct it, or even that he was an employee at the time of such construction. The fellow-servant rule, therefore, cannot be invoked. No facts appear to indicate that appellee was negligent, and he alleges that he was not negligent. We cannot, therefore, presume contributory negligence. It is not claimed that any essential fact is wholly omitted. We cannot concur in appellant's position that the complaint did not state facts sufficient to bar a second action for the same injuries. If the complaint were tested upon demurrer, we should not feel safe in

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the conclusion that its facts were sufficient to constitute a cause of action.

A conflict between the general verdict and answers to interrogatories is claimed, and is urged as sustaining appellant's motion for judgment *non obstante*. Finding it necessary to reverse the judgment of the lower court, and, believing that this question will not arise again in the cause, we pass it without decision.

The cause was tried and submitted to a jury, upon the testimony introduced on behalf of the appellee. The following facts were established without conflict: The appellant engaged in the construction of a railway bridge, and the labor thereon was performed by a foreman, the appellee, and two or three other bridge carpenters. The work had proceeded to the point where twelve or fourteen bents had been constructed, and another was being added. Upon these bents, and extending from one to another, as they were constructed, the appellee and his fellow-workmen laid, near the center, two timbers, side by side, each timber being sixteen inches wide and sixteen feet long. Upon these timbers were placed, lengthwise and end to end, oak boards three inches thick by ten inches wide. The timbers and boards so laid constituted a track upon which to transport, by means of a small but heavy carriage, the timbers from which the bridge was constructed. On the outer edges of the bents, and on either side of this track, were laid board walks for the workmen to walk upon in the discharge of such duties as required them to be upon the superstructure. In the top course of the track it was found that the ends of the boards would vary in thickness, and would make uneven joints. In order that these joints might be even, and afford a smoother course for the timber carriage, the appellee and his fellow-workmen would insert, under the thinner boards, a

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wedge, or shim, of such thickness as would bring the upper surfaces of the boards, at the ends, upon a level each with the other. In the use of this track, from time to time, these wedges, or shims, would work out from their places; and, to maintain a smooth track, all of the workmen, including the appellee, observed the condition of the joints and the positions of the wedges, or shims, and, when necessary, replaced them. These wedges, or shims, if displaced, could easily be seen by any one who would look at the joints.

This work, in which the appellee engaged, proceeded from the 26th day of December, 1892, until the afternoon of March 9, 1893. This method of transporting timbers was the usual and customary method in bridge building. The day of appellee's injury, he had frequently been upon the superstructure and along the course of the track. The foreman had, likewise, been upon the superstructure and along the course of the track several times during the day, and had directed the work for that particular afternoon. The work so directed was in the transportation of timbers. In this, the appellee and two other workmen were engaged; and, at the time of the misfortune, the appellee was upon one of said board walks, the other two workmen were pushing and guiding the timber carriage with a large timber upon it. The appellee was proceeding towards the extended end of the timber, to assist in pushing and guiding it, though he had not come nearer than four feet from it when the carriage came upon a joint in the track, from which a wedge or shim had worked and left the joint uneven. In meeting this uneven joint, the carriage was jolted, and the timber thereon toppled and fell from the superstructure. In its fall it struck the board upon which the appellee was walking, and so jarred and disturbed it as to precipitate the appellee to

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the water below, a distance of fifty-three feet, and from which he suffered the injuries complained of. When the carriage had gotten upon the uneven joint, the appellee could not see that the wedge or shim had worked out.

The question is presented as to whether, upon these facts, the verdict should have been for the appellee.

The ordinary rule urged by the appellee, that this court will not determine the weight of conflicting evidence is not available to support the verdict, since, as we have shown, the evidence is without conflict and presents the case, upon the facts stated, in as favorable a view for the appellee as possible. The question of the appellant's liability, therefore, is not one of fact for the exclusive decision of the jury, but is one of law upon which the lower court could, and this court must pass. *Faris v. Hoberg*, 134 Ind. 269 ; *Ohio, etc., R. W. Co. v. Dunn*, 138 Ind. 18 ; *Day v. Cleveland, etc., R. W. Co.*, 137 Ind. 206.

That the facts should warrant a recovery it was indispensable that the appellee should establish, by the evidence, some duty owing to him at the time, by the appellant, the breach of which resulted in the injury complained of, and that he had not by his own negligence contributed to the injury. It is inconceivable that there should be a liability without a breach of duty. Not only so, but, if it be found that there is some breach of duty on the part of the master, and it be further found that with a knowledge of this breach the servant continues in the service, not notifying the master of the breach, and receiving no assurances that the defect or negligence will be repaired, the servant will be deemed to have assumed the hazard of such defect or breach, and to have waived a right of recovery for injury therefrom. *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156 ;

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Ames, Admr., v. Lake Shore, etc., R. W. Co., 135 Ind. 363; *Lynch v. Chicago, etc., R. R. Co.*, 8 Ind. App. 516.

What duty of the appellant was violated? The appellee seeks to uphold the verdict and judgment in his favor, upon the assumption that the appellant was negligent in not keeping the wedges in place. The argument is that the place for the performance of the labor was unsafe, and that the foreman was a vice-principal, and neglected to keep the wedges in place.

It is the general rule that it is a duty of the master to supply safe places and appliances for the service of his employes, but it is not understood that this duty requires the master to make a powder-house a place of safety or to make railroading as free from danger as hoeing corn or to make the labor of bridge building, at fifty-three feet above the ground, as free from hazard as the service of an office clerk. Every service has its own peculiar hazards and the law does not hold the master accountable for such hazards as ordinarily and naturally belong to any service. Here the direct and only cause of the injury was in the displacement of a wedge. The injury was due not to the ordinary nor to the extraordinary dangers of the place of service, but simply to the manner of using the ordinary instrumentalities of the service. It was not complained, nor was it in evidence, that the use of wedges or shims was required by the master when another appliance would have been safer. Neither was it a question that the master supplied the wedges or shims. On the contrary it was an established fact that the method adopted for the transportation of the timbers was the usual and ordinary method; and the appellee, without misdirection from the appellant or ignorance on his part, participated in the construction of the track and in the placing and use of the wedges, with every opportunity to know their hazards that the

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appellant or its servants possessed. No imperfection in timber, tools or appliances, as supplied by the company, is even suggested. It is perfectly clear that the injury was not caused by any breach of duty on the part of the company in supplying a dangerous place to work or unsafe tools or appliances. It was not the theory of the action that the company had been guilty of a breach of duty in employing an unskilled or careless servant nor did the evidence tend to support such a theory. But it is said that the foreman was a vice-principal and neglected to keep the wedges in place. There is no vice-principal where the duty owing is not one devolved upon the master. *New Pittsburg Coal, etc., Co. v. Peterson*, 136 Ind. 398, and authorities cited. We have already demonstrated that the duty neglected was not one resting upon the master. It did not arise from an obligation to supply a safe place or safe appliances. The rule may be broadly stated that the master is never liable for failing to supply a safe place for the servant to work when the work consists in making safe the place and the condition of which he complains. One engaged in constructing a railway cannot complain that he was injured by reason of the failure of the company to have a completed railway. *Evansville, etc., R. R. Co. v. Henderson*, 134 Ind. 636. Nor can one employed in mining coal, and who is supplied with timbers to make safe the roof of the apartment in which he works, complain of injuries received from slate falling because such timbers are not put in place by him. *Coal Co. v. Estievenard*, (O.) 40 N.E. Rep. 725. Nor can a laborer digging a trench, and thereby making the place in which he works, recover for personal injuries resulting from the falling of the sides of the trench.

We might stop at this point, since we think it is clear that the appellee failed to show the breach of any duty owing to him by the appellant, but, as we have seen that

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the injury resulted from the manner in which the proper appliances for the work were employed, it is apparent that those who carelessly employed such appliances are blamable. The appellee knew the character of the track and the necessity for care to keep the wedges in place when running the carriage over the track. He participated in running the carriage without observing the condition of the joints, and by this failure is himself blamable. He and the other workmen had from time to time taken care, as they used the track, to see that the wedges were in place; no particular person had been designated to keep them in place and the exigencies of the occasion did not deny the appellee the opportunity of observing the condition of the track before taking the risk of running heavy timbers upon it and that he did so take the risk was either contributory negligence or the assumption of the hazard. As we have shown, either contingency is fatal to his recovery.

He had every opportunity that the appellant had of knowing the tendency of the wedges to work out and render the track unsafe, and continued in the service with no promise of a different method of maintaining a smooth track. In so continuing with such knowledge, he assumed the hazard and waived liability. *Ames v. Lake Shore, etc., Co., supra*, and cases there cited; *Day v. Cleveland, etc., Co., supra*, and cases there cited. As said in the last cited case: "In a case where the servant is one of mature age and experience, as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger." Again it is said: "The law requires that men shall use the senses with which nature has endowed them, and when without excuse one fails to do so, he alone must suffer the consequences, and

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he is not excused where he fails to discover the danger if he made no attempt to employ the faculties nature has given him." See case there cited. Here the appellee's only excuse for failing to know the condition of the track was that the carriage was upon the joint and obstructed his view. This, at the instant of the occurrence, may have been true; but, as we have said, no emergency was shown for going upon the loose joint without learning its condition, when, as the evidence showed, it could have been seen by looking at it. It was certainly not due care to have proceeded without looking. There is no view of the case as made by the evidence which supports the verdict and judgment. The judgment is reversed, with instructions to sustain the appellant's motion for a new trial.

Filed December 10, 1895.

No. 17,241.

TAGGART, AUDITOR, ET AL. v. THE STATE, EX REL. WILLIAMS.

COMMON SCHOOLS.—*Surplus Dog Fund.—How Distributed.—Township Trustee.*—The surplus dog fund. in the hands of a township trustee should be distributed among the school corporations in the township in proportion to the school population of each corporation at the time when such fund should have been distributed, where, since its collection, the division lines of such corporations have been changed.

From the Marion Superior Court.

Ayres & Jones, A. V. Brown and H. C. Allen, for appellants.

C. A. Dryer, for appellee.

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143	706
142	668
145	242

142	668
150	171
150	172
150	176

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HOWARD, J.—This was an action brought by the appellee's relator, as treasurer of the board of school commissioners of the city of Indianapolis, against the appellant, Thomas Taggart, auditor of Marion county, to obtain a mandate requiring said auditor to distribute the surplus dog fund which had, upon the first Monday of March, 1891, been paid to the treasurer of Marion county by the respective trustees of the several townships of said county; and requiring, also, that said auditor issue to the relator, as such treasurer of said board of school commissioners of said city, a warrant for the portion of such surplus fund which should come to said city upon a distribution of the fund, in the same manner as the interest upon the congressional school fund is distributed by law. The appellant, Samuel N. Gold, as trustee of Center township, and also as trustee of Center school township, in said county, being the township in which said city is situated, was, upon his petition as intervener, also made a party defendant in the trial court. Separate demurrers were filed by each of the defendants to the alternative writ of mandate, which were overruled and the rulings excepted to. Each defendant then filed a separate return to the alternative writ, to which demurrers by the appellee's relator were sustained, and the appellants excepted. The questions presented on this appeal are upon the rulings of the court upon the several demurrers.

The petition and alternative writ show that the sums paid to the county treasurer, on the first Monday of March, 1891, by the several township trustees of Marion county, as surplus dog fund, left after payment of all losses on account of sheep killed or maimed, amounted to \$4,882.42, which sum remained in the hands of said county treasurer on the second Monday of March, 1891,

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and has since remained in the hands of said treasurer, although this relator has several times demanded of said auditor that he make distribution of said surplus dog fund, and issue to said relator, as treasurer of said board of school commissioners, a warrant for the payment of the portion of such surplus coming to said city.

It is contended by the relator, that the surplus fund so in the hands of the county treasurer on the first Monday of March, 1891, having been assessed and collected under the act in force March 7, 1883 (Acts 1883, p. 148), as amended by the act approved April 8, 1885 (Acts 1885, p. 161), should have been distributed on the second Monday of March, 1891, as provided in said last act, "for the schools of the county, in the same manner that interest upon the congressional school fund is distributed."

The appellants, on the other hand, contend that, inasmuch as the acts of 1883 and 1885 were repealed by the act on the same subject, approved March 5, 1891 (Acts 1891, p. 453; sections 2848 to 2864, R. S. 1894); and inasmuch as section 236 of the general act concerning taxation, approved March 6, 1891 (Acts 1891, p. 286; section 8654, R. S. 1894), was in force on said second Monday of March, 1891; therefore the distribution of the fund must be made under the provisions of said last mentioned section, which requires that the dog fund should "be paid over by the county treasurer to the proper township trustee," and that the surplus of said fund, left after payment of losses on account of sheep, should "be expended by such trustee for the use of the school revenue of the township."

After the judgment was rendered in this case, but before the appeal was taken, this court, in the case of *Florer, Treas., v. State, ex rel.*, 133 Ind. 453, decided that when the act of March 6, 1891, concerning taxation,

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was passed, the laws of March 7, 1883, and April 8, 1885, in relation to the taxation of dogs, were not in force, having been repealed by the act of March 5, 1891, on the same subject; and, further, that said section 236 of the act of March 6, 1891, being in force on and after that date, made the township trustee the custodian of the dog fund for the purposes mentioned in the statute; and that, when properly applied for, the county treasurer is required to pay over said fund to such trustee; and to that holding we still adhere.

The primary purpose for which the dog fund is assessed and collected, is for the payment of losses suffered in the township by the killing and maiming of sheep by dogs. After this primary purpose has been satisfied, and there remains in the fund a surplus in excess of fifty dollars, the trustee is required, by said section 236, to expend such surplus "for the use of the school revenue of the township." As this provision of the law was in force on the second Monday of March, 1891, and has been in force ever since; it follows that the auditor could not be required on that day, or afterwards, as adjudged by the trial court, to "make distribution of the said sum of \$4,882.42, the surplus of the county dog fund in the county treasury, for the schools of said county, in the same manner that the interest upon the congressional school fund is distributed under the law." The custody of the fund is in the township trustees of the several townships.

Counsel for appellee admits this to be the case as to the surplus of such parts of the dog fund as have been assessed and collected since the present law went into effect, but insists that the distribution of all funds assessed and collected prior to the passage of the present law must be made under the former laws. The reasoning by which such conclusion is reached, if ingen-

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ious, is fallacious. Political and municipal corporations and their officials are but the creatures of the law-making power, and have no vested rights in public funds entrusted to their care. Such funds are always under the sovereign control of the Legislature, subject only to such limitations as may be imposed by the constitution. Certainly, in this case, townships that had diminished or wholly exhausted their dog fund, in paying for their killed or maimed sheep, had no vested right in any part of a dog fund raised by taxation on dogs in other townships. The Legislature had an undoubted right to say that such dog fund should be put into the custody of the several township trustees of the respective townships in which the fund had been raised by taxation, no matter under what laws the fund had been assessed or collected. It was most strictly in accordance with the constitution that the fund should, in each case, be distributed and used in the township in which it was levied. Such change in the law was getting nearer to the constitution, rather than farther away from it. It might well be questioned whether the act of 1885, which created a county dog fund, and supplied deficiencies in one township by drawing from the fund raised in other townships, was itself in harmony with the constitution; but the question is not before us, and we do not decide it.

It is finally argued by counsel, that the present law, section 236, of the act of March 6, 1891, *supra*, must be invalid, for the reason that, in townships containing a city school corporation, in addition to, and distinct from, the school township, as in the case before us, a large part, indeed the greater part, of the dog tax is collected from the inhabitants of the city, and yet the custody of the fund so collected is placed in the hands of the township trustee, the surplus to be "for the use of the school revenue of the township," thus excluding the inhabi-

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tants of the city from a participation in the distribution of the fund collected from them in common with the other inhabitants of the township.

It is true that in the case of *School City v. Jaquith, Tr.*, 90 Ind. 495, this court decided that, under a similar statute, the city was not entitled to share in the distribution of the surplus dog fund. It would seem, however, from an examination of the opinion in that case, that the constitutional question was not there raised, as it is here, but that the matter before the court was simply an interpretation of the statutes. And while it was intimated in that case that the statute was inequitable, yet it was held to be valid.

It is our duty, when the question is presented, if possible, to reconcile the statute with the constitution, rather than to hold the statute unconstitutional.

By section 1, art. 8, of the constitution, the General Assembly is required "to provide, by law, for a general and uniform system of common schools." By section 22, art. 4, the Legislature is forbidden to pass local or special laws, "providing for supporting common schools, and for the preservation of the school funds." By section 23, art. 1, it is provided that "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

There is reason in the contention of counsel, that these provisions of the constitution would be violated by a law which should provide that a school fund raised by taxation upon the citizens of that part of a township within the limits of a city, might be turned over to the citizens of that part of the same township without the limits of the city.

In *Kerlin v. Reynolds*, 142 Ind. 460, it was held by this court that property within the limits of a city can-

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not be taxed for purely township purposes, in which the residents of the city have no part.

In *Robinson, Treas., v. Schenck*, 102 Ind. 307, it was said that: "The Legislature cannot make an unequal distribution of money derived from a general levy, make an unequal general levy, or grant to some school corporations benefits or rights withheld from others."

In *Maloy v. Madget*, 47 Ind. 241, the controversy was, whether a township trustee could employ a teacher in a single district of his township, to teach a school, when no other schools were being taught in the township, and pay him out of the fund arising out of the township dog tax. The court held that this could not be done; that the dog tax "is a fund to which all the schools in the township have an equal claim, and it should be apportioned, by the trustee, among the schools, with the other tuition funds, accordingly."

The reasoning in the case last cited may be applied to the present case; for if the whole township, including the city, is a taxing district for the assessment and collection of taxes on all dogs therein, the surplus over fifty dollars of the fund thus created, after the payment of sheep losses, being "for the use of the school revenue of the township," then it would seem that, whether one school of the township, or all the schools of a certain part of the township, are deprived of their share of the fund, the result is the same; and that that uniformity of apportionment in the State, and in each county, township, city and town, according to the enumeration of children in each, which appears to be a central idea, as well as a constitutional requirement, in the system of common schools, is violated.

It is not clear, however, that the present law for the distribution of the surplus dog fund, section 236 of the

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act of March 6, 1891, *supra*, is obnoxious to the constitutional inhibitions which we have been considering; or that the Legislature, in enacting that statute, intended thereby that the fund should be distributed solely to the schools of the township, outside the limits of incorporated cities and towns therein situated. If the statute can be interpreted so as to show that its provisions are in conformity with the constitutional requirements, that, as we have already said, should be done. The presumption always is, that the Legislature, in the enactment of a statute, did not intend that it should infringe upon the constitution.

As a matter of fact, the statute does not, in terms, provide that the surplus dog fund in the hands of the township trustee shall be distributed to the school township. The language is: "The surplus over said sum of fifty dollars shall be expended by such trustee for the use of the school revenue of the township." We are of opinion that by this provision the township trustee is required to turn over to each school corporation in his township, its proportion of said surplus dog fund in his hands, *pro rata*, according to the school enumeration in each of such school corporations.

The previous legislation on this subject is instructive in this connection, and leads to the same conclusion. In the act approved March 14, 1877 (Acts 1877, special session, p. 74), after providing, as in the present law, that the surplus dog fund in the hands of the township trustee should be "placed to the credit of the tuition fund of such township," the following provision was added: "The township trustees of the several townships are hereby authorized to pay the same to school trustees of incorporated towns or cities, their proportion, *pro rated*, according to the enumeration, for school purposes within such township."

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This provision does not seem to have been expressly, if even impliedly, repealed. The act of 1881 (Acts 1881, p. 397) provides only that laws "in conflict" with that act are repealed; but the clause of the act of 1877 for paying to school trustees of cities and towns their *pro rata* share of the surplus dog fund tax, is not in conflict with anything in the act of 1881. In like manner the repealing clause of the act of March 5, 1891 (Acts 1891, p. 455), repeals, *pro tanto*, all laws "in conflict." And while the act of April 8, 1885 (Acts 1885, p. 161), was, as we have said, of doubtful constitutionality; yet, even there the effort was made to distribute the surplus fund to all "the schools of the county," including, of course, those of school towns and cities.

Whether, therefore, we consider this distribution clause of the act of 1877 as still in force or not, there is no doubt, as we think, that in all these acts, as well as in the present law, the Legislature manifested an intention to divide the surplus dog fund amongst all the schools in the township, including those in cities and towns, in proportion to the school enumeration in each. The custody of this fund is in the hands of the township trustee; but he must account to each school town and school city within his township for their proportional share of the fund. In case a city or town should be situated, in part, in two or more townships, the distribution must be made in like manner by the trustee of each township, in proportion to the school children of each corporation, living in each of such townships. Any other interpretation of the statute would not only be inequitable, but also in violation of the letter and spirit of the constitution. *School City v. Jaquith, Tr., supra*, must therefore be overruled.

As, however, the trial court in this case held, in effect, that the custody of the dog fund is not in the

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hands of the township trustee, the judgment is reversed, with instructions to sustain the appellants' demurrer to the alternative writ of mandate, with leave to amend the pleadings or to file new pleadings, and for further proceedings not inconsistent with this opinion.

Filed March 21, 1895.

ON PETITION FOR REHEARING.

HOWARD, J.—In the petition for a rehearing of this case, it is said that since the levy and collection of the dog tax herein certain populous parts of Center township have been annexed to the city of Indianapolis, and, perhaps, to other municipal corporations in said township; and that it would therefore be unjust now to divide the surplus dog fund in the hands of the township trustee in proportion to the school population of the several school corporations in the township, as they now exist; and we are referred to *Zartman, Tr., v. State, ex rel.*, 109 Ind. 360, as illustrating the equity that ought to be observed in this case.

We are in entire accord with the justice shown in the decision referred to; but we do not think the decision of the court in the case at bar contemplates any such inequitable distribution as apprehended by counsel. The township trustee should distribute to each of such school corporations, including his own, their *pro rata* share of the surplus dog fund in his hands, in proportion to the school population in each corporation at the several times when the fund should have been distributed to them by him.

The petition is overruled.

Filed December 11, 1895.

No. 17,522.

UEKER, ADMX., v. THE BEDFORD BLUE STONE CO.

BILL OF EXCEPTIONS.—Filing.—Record.—A bill of exceptions will not be considered as part of the record where the transcript does not show that it was ever filed in the office of the clerk of the trial court.

APPELLATE PROCEDURE.—Court Directing Verdict.—Evidence Not in Record.—A direction of a verdict for defendant will be presumed, on appeal, to have been justified by the evidence, where the evidence is not properly in the record.

From the Lawrence Circuit Court.

N. F. Crooke, J. R. East and R. G. Miller, for appellant.

J. H. Willard and W. H. Martin, for appellee.

MCCABE, J.—The appellant sued the appellee to recover damages sustained by the widow and children of her intestate August Ueker, through the alleged negligence of the appellee in causing his death. There was a trial of the issues joined, by a jury. After the close of the evidence, the court instructed the jury to return a verdict for the defendant, which they accordingly did. The court overruled the plaintiff's motion for a new trial and rendered judgment on the verdict for the defendant. The only error assigned is upon that ruling. Among the reasons assigned in the motion for a new trial, and the only one insisted on in the appellant's brief, is that the trial court erred in directing the jury to return a verdict for the defendant. The ground of this contention is that the evidence was of such a character that it was not subject to a demurrer, and that it was sufficient to have warranted the jury in finding a verdict for the plaintiff. That involves the necessity

142	678
144	149
146	821
147	516
142	678
149	559

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of an examination of the evidence. We are at this point met with the contention from the appellee that the evidence is not in the record, and hence the question sought to be raised is not presented thereby for our consideration. There is in the transcript what purports to be a bill of exceptions incorporating therein what purports to be a long hand manuscript of the evidence.

But the transcript nowhere shows that such bill of exception was ever filed in the office of the clerk of the trial court. Without such a showing, such supposed bill of exceptions is not and cannot be regarded as a part of the record. *Loy v. Loy*, 90 Ind. 404; *Stewart v. State*, 113 Ind. 505; *Guirl v. Gillett*, 124 Ind. 501; *Shewalter v. Bergman*, 132 Ind. 556; *Board, etc., v. Huffman*, 134 Ind. 1; *Downey v. Head*, 138 Ind. 503; *Pittsburgh, etc., R. W. Co. v. O'Brien*, 142 Ind. 218; *Armstrong v. Dunn*, 41 N. E. 540; *Ayres v. Armstrong*, 142 Ind. 263; *Drake v. State*, 41 N. E. R. 799; *Wenning v. Teeple*, 41 N. E. R. 600.

The presumption is that the trial court was justified by the evidence in directing a verdict for the defendant, until the contrary is made affirmatively to appear by the record. Therefore the judgment is affirmed.

Filed December 11, 1895.

No. 17,547.

THE STATE, EX REL. BOARD OF COMMISSIONERS, ETC., v.
JAMISON, AUDITOR.

MANDAMUS.—*By a County Against the Auditor of Another.*—Attorney's Fee.—Appeal.—Criminal Law.—One county cannot maintain mandamus against the auditor of another county to enforce collection of a claim by the former county against the latter, for money

142 679
148 427

142 679
153 378

142 679
157 48
157 382
157 540

142 679
165 345

The State, *ex rel.* Board of Commissioners, etc., v. Jamison, Auditor.

paid an attorney for the State on appeal in a criminal action transferred to such former county from the latter but such claim must, under section 7845, R. S. 1894, be presented to the commissioners of the latter county.

PRACTICE.—*Maxim.*—*Notice.*—Every one is entitled to his day in court, and no one shall be condemned unheard.

From the Tippecanoe Superior Court.

C. Johnston and *W. H. Johnston*, for appellant.

C. E. Lake and *J. B. Milner*, for appellee.

JORDAN, J.—This was an application, in the name of the State, by the board of commissioners, of the county of Montgomery, in the lower court, for a writ of mandate against appellee, auditor of Tippecanoe county, to compel him to issue a warrant upon the treasurer of his county, for the payment of money to reimburse Montgomery county for certain expenses and charges paid by it, and growing out of the trial of the cause of the *State of Indiana v. William F. Pettit*, charged with murder, and tried in the latter county upon a change of venue from the former.

It appears from the facts alleged in the complaint, that one W. C. Wilson, an attorney at law, previous to the change of venue of said cause, had been appointed by the Tippecanoe Circuit Court to assist the State's attorney in the prosecution of Pettit; that after the change to the Montgomery Circuit Court, the judge thereof appointed George P. Haywood, an attorney, to assist in the prosecution. Haywood and Wilson were allowed by the Montgomery Circuit Court for their services in the lower court, the sum of \$1,500.00, and as to that amount Montgomery county has been reimbursed by the county of Tippecanoe. Pettit was tried, convicted and sentenced to be imprisoned in the State's prison for life. From this judgment he appealed to the Supreme

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Court, and the trial court assigned Haywood to assist the State in said appeal, and for his services therein allowed him in addition, the sum of \$2,000.00. The amount therefore in controversy is the two thousand dollars allowed and paid to Haywood for his said services in behalf of the State in said cause in the Supreme Court. The court sustained a demurrer to the alternative writ and application, and rendered its final judgment denying the writ and for cost against the relator. The action of the court in sustaining the demurrer is assigned as error.

The main question, which the parties to this appeal argue and seek thereby to present, is the validity of the allowance made by the Montgomery Circuit Court to Haywood and paid by that county upon the court's order for his service in said cause on the appeal to the higher court. Appellee contends that the court had no right or power to allow Haywood compensation for such services out of the public funds, neither under the appointment made assigning him to assist in the prosecution in the lower court, nor under the subsequent appointment, assigning him to assist the State in defense of the appeal in this court. The question thus sought to be presented for our decision is one of much interest to the public, but as the judgment must be affirmed for the reason, that the relator has not invoked the proper proceedings to secure reimbursement for the claim in question, we are not required to decide it.

In the case of *Trant, Aud., v. State*, 140 Ind. 414, this court held that an action of mandamus will not lie against the auditor of a county to compel him to issue a warrant upon the county treasurer for the charges and expenses incurred and paid by another county, for a cause therein tried, upon a change of venue from the one wherein the cause of action arose.

The State, *ex rel.* Board of Commissioners, etc., v. Jamison, Auditor.

This court in the case cited, said: "The order of the Grant Circuit Court auditing and allowing the cost and charges of the Sage case against Blackford county, * * * was not final or conclusive. Blackford county was not a party to such proceeding, and the appellant may contest the correctness of the allowance made."

It was further said: "Under these rules, Grant county must file her claim with the auditor of Blackford county, to be by him presented to the board of county commissioners, as required by section 7845, R. S. 1894, section 5758, R. S. 1881."

The holding in that case is decisive of this appeal, and it follows that the relator in this action cannot enforce collection of its claim in question, by a writ of mandate against the auditor of Tippecanoe county; but must present it to the board of commissioners of that county, as provided by section 7845, R. S. 1894, section 5758, R. S. 1881. The commissioners of that county can then, as provided by sections 7847 and 5759 of the statutes cited, examine into the merits of the claim, and allow it in whole or in part as they may find it to be just and owing. In the event the board should disallow the claim in whole or in part, the relator, as claimant therein, if it should feel aggrieved by the action of the board of commissioners, can exercise the right of appeal to the proper court, or institute an independent action, in which court the validity of the claim, or the reasonableness of the amount allowed for the services in question, under all the circumstances and evidence that may appear upon the trial thereof, may be judicially determined with both of the interested counties properly before the court. See *Board, etc., v. Heaston*, 41 N. E. Rep. 457.

In the case of the *Board, etc., v. Summerfield*, 36 Ind. 543, this court in answering the contention of counsel

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therein that the order of the court in settling and allowing the expense and charges in controversy was conclusive, on page 546 of the opinion, said :

“We cannot concur with that view of the law. To make an order or judgment of the court final and conclusive it is necessary that the party to be affected should be a party to the record. The action of the Jennings Circuit Court in making such an allowance was *ex parte*. The board of commissioners of Brown county was in no sense a party to such proceedings.”

A county, under the statute, is made an involuntary corporation, and clothed with the power to prosecute and defend suits, etc. (section 7820, R. S. 1894, section 5734, R. S. 1881). To assert the doctrine that a court is authorized, *ex parte*, to make an extraordinary allowance against a county, and enforce the payment thereof, by mandate, through the auditor, without giving it an opportunity to examine into the validity or merits of the claim or allowance, or to contest the same through its own legally constituted agents, in a proper court, would in effect militate against the ancient maxim of jurisprudence, that every one is entitled to his day in court, and no one shall be condemned unheard.

The auditor, generally speaking, is not the agent of his county. Therefore, if the court could make large allowances to parties for their services in and about the administration of justice, and, by an *ex parte* order, make them absolute and conclusive, and compel the payment thereof out of the public funds, by a mandate against the auditor, without giving the county liable therefor the right by its proper agents to examine into the validity of the allowance, or be properly heard in defense thereto; such a proceeding or action of the court might result in subjecting the public money to the payment of unlawful and exorbitant demands.

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Such a result the law does not intend, and it is the duty of the courts to so construe it as to avoid this mischief, at least, so far as practicable.

As to the ultimate liability of Tippecanoe county for the allowance in question, we need not and do not decide, but we may, however, suggest, without deciding the question, that the power of the court, inherent or otherwise, under our present system of laws, to assign an attorney to assist the State in the defense of an appeal to this court, in a criminal action, and award him compensation for his services therein from the county treasury, may well be questioned. The reasons for denying this right or power are, we think, obvious. The statute makes it the imperative duty of the attorney-general to represent the State in the supreme court in all criminal cases, and while the services of the prosecuting attorney may be and generally are accepted by the attorney-general, in behalf of the State, in such appeals, still the latter officer has the exclusive control and management of the case upon appeal. *Stewart v. State*, 24 Ind. 142.

This officer is, from the high character of his office, and the amount of the compensation paid for his services, presumed, at least, to be an attorney of ability, learned and skilled in the science of his profession. Again, when the defendant in a criminal cause appeals from a judgment of conviction to this court, the State is relieved of the burden of the contest. In the trial court, it has the laboring oar, and the *onus* is cast upon it to convict the accused according to law, and to establish his guilt by the evidence beyond a reasonable doubt. But upon an appeal by the defendant to this court, which is merely one of error, the *status* of the parties is changed. The case comes here with all the presumptions in favor of the judgment of the lower court.

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We do not weigh the evidence, nor reverse upon the question of preponderance. The burden under the rule by which the appeal is controlled, is cast upon the appellant, and he is required to affirmatively show by the record the error of which he complains, and that the same was prejudicial to his substantial rights. Therefore, the reasons or necessity that sometimes exist for the trial court to assign counsel to assist the State in the prosecution of a criminal, in the lower court, do not apparently exist in this court upon an appeal by the defendant.

For the reason that the relator cannot enforce his alleged right by mandamus, the court consequently did not err in sustaining the demurrer, and the judgment is affirmed.

Filed December 11, 1895.

No. 17,167.

BRASHEAR ET AL. v. THE CITY OF MADISON ET AL.

MUNICIPAL CORPORATION. — *City.* — *Indebtedness.* — *Constitutional Limitation.*—The constitutional limitation of indebtedness is not violated by a city in purchasing a fire-alarm telegraph, when there is money on hand and appropriated for fire purposes sufficient to pay the cost thereof, although the city is already indebted for more than the constitutional amount, and it may not be a wise thing for the common council to expend the fire appropriation in this way.

(See Note at end of opinion.)

PLEADING.—*Facts Peculiarly Within the Knowledge of Opposite Party.*—A pleading need not allege facts peculiarly within the knowledge of the party against whom they should be pleaded, and which are not accessible to the pleader, but should state that such is the case.

From the Jefferson Circuit Court.

142	685
145	74
146	473

142	685
148	477

142	685
156	98

142	685
162	174

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C. A. Korbly and W. O. Ford, for appellants.

Sulzer & Bear, P. E. Bear, J. W. Kern and F. M. Griffith, for appellees. .

HOWARD, C. J.—In the complaint in this case the appellants, citizens and taxpayers of the city of Madison, alleged that the common council of said city had entered into a contract with the Gamewell Fire Alarm Telegraph Company for the erection and location of a fire alarm system in said city, for which, on approval, the city was to pay \$5,000. It was further alleged that the city was already indebted far beyond the limits fixed by the constitution, being two *per centum* of the value of the taxable property within said corporation, and hence had no power to incur such additional obligation.

Other allegations were: that the city council had been compelled to borrow money to pay current expenses, and had also sold city property for this purpose, for which \$1,618.40 was received; that the revenues from taxation for the current fiscal year would not be to exceed \$49,827.83; that of this sum, appropriations for the fiscal year to the amount of \$44,000 had been made, one item of which was “fire, \$6,000”; and that at the time of the commencement of this action \$22,170.79 of the appropriations so made had been expended.

Prayer for a temporary restraining order and on the final hearing for perpetual injunction.

A restraining order was granted as prayed for, but on the final hearing a demurrer to the complaint was sustained and the restraining order dissolved.

The members of the common council were sworn to support the constitution, and, until the contrary is shown, the presumption must be that they performed their duty. Unless, therefore, it appears clearly from

the allegations of the complaint that the city authorities disregarded the command of the constitution in relation to municipal indebtedness, we must hold that the court did not err in sustaining the demurrer.

Much is said in argument as to the necessity of a fire alarm telegraph for the welfare of the city. This, however, can have little bearing on the decision. The language of the constitution is that the corporation shall not, "in any manner or for any purpose," become indebted beyond the limit fixed. If the city is already indebted to the constitutional limit, then even the most necessary expenses must be met only by the current revenues; and a debt cannot be contracted even for cleansing the streets or for protecting the city from fire. An exception is made by the constitution itself in case of "war, foreign invasion or other great public calamity;" and the exception so made renders the prohibition itself only the more absolute.

In our own decisions, as well as in those of other States having constitutional provisions similar to the one under consideration, there has been some discussion as to what is meant by the term indebtedness as used in this article of the constitution. No good reason, however, has been advanced to show that the word in this connection should have any other than its ordinary signification; that is, the contraction of an obligation for which there is no present means of payment.

In the case of *Sackett v. City of New Albany*, 88 Ind. 473, a case much like the one before us, it was said by this court: "By 'indebtedness', in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. It was obviously the intention of the Legislature in submitting, and of the people in adopt-

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ing, the thirteenth article of the constitution, to arbitrarily restrict the power of municipal corporations to contract debts to a limited *per centum* of their taxable property, and to require, when that limit of indebtedness has been reached, that such corporations shall be prepared to pay for whatever of value they may obtain without incurrence of any further indebtedness for any purpose whatever. In this view the allegation of the complaint, that there was no money in the treasury of the city of New Albany which could be applied to the payment of the claim of the fire alarm telegraph company, was a material and pivotal allegation in this proceeding."

In the complaint in the case at bar there is no allegation that there was no money in the treasury of the city of Madison which could be applied to the payment of any obligation that might arise under the contract in favor of the fire alarm telegraph company. On the contrary, there are facts alleged in the complaint going to show that there was such money in the city treasury. The amount to be received from taxes during the current year was nearly \$50,000, and city property was sold to the amount of over \$1,600. The sum of \$44,000 had been appropriated for various city purposes, \$6,000 being for fire. Of the money appropriated, something less than \$23,000 had been paid out, leaving over \$28,000 unexpended at the time the contract was made. Of the \$6,000 appropriated for fire purposes, the complaint does not state whether any part was expended. For anything that is said in the complaint, this \$6,000 was lying in the treasury, to be expended for fire purposes as the common council might judge best.

Whether it was a wise thing and in the best interests of the city to take \$5,000 out of the \$6,000 appropri-

ated for fire, and use that \$5,000 for the purchase of a fire alarm telegraph system, was a question within the discretion of the common council, and with which the courts will not interfere. *City of Valparaiso v. Gardner*, 97 Ind. 1; *Coal Float v. City of Jeffersonville*, 112 Ind. 15; *Cleveland, etc., R. W. Co. v. Harrington*, 131 Ind. 426; Dillon Munic. Corp., sections 308, 397; 10 Am. and Eng. Ency. of Law, 301.

The constitutions of Iowa, Illinois and Pennsylvania contain provisions in regard to municipal indebtedness quite similar to our own. In the case of the *Appeal of the City of Erie*, 91 Pa. St. 398, the court quotes with approval from *Grant v. City of Davenport*, 36 Iowa 396, as follows: "Where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally, and in good faith intends to, levy therefor, such contract does not constitute 'the incurring of indebtedness, within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.'" Of this the Pennsylvania Supreme Court says: "This, we hesitate not to say, is a sound constitutional interpretation, and in a similar case might well be adopted in the construction of our own constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objection can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created." *Appeal of the City of Erie, supra.*

In Illinois the ruling of the courts has adhered with the utmost strictness to the words of the constitutional inhibition, yet it is there held that a corporation which

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has reached the constitutional limit of its power to create indebtedness, may, nevertheless, when a tax is levied, and even before the tax is collected, draw against the fund thus levied and provided; and the issuing of such a warrant upon the treasury is not the creation of a debt against the city, but the appropriation of a part of the fund to be collected. *City of Springfield v. Edwards*, 84 Ill. 626; *Law v. People, ex rel.*, 87 Ill. 385; *Fuller v. Heath*, 89 Ill. 296.

In the *City of Valparaiso v. Gardner*, already cited, this court, after citing and discussing many authorities, held that, while a debt may not be created, even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit; yet that the current revenues may be applied to the payment of the current expenses, even though the effect should be to postpone claims of judgment creditors or other obligations past due, and that when the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there cannot be said to be any debt thereby created. See also *Dillon Munic. Corp.*, sections 135, 136, and notes.

There is a substantial agreement in these cases, that a municipal indebtedness is not created by contracting for something which the common council has determined is necessary for the welfare of the city, and agreeing to pay for it out of funds appropriated to that use and at the time in the city treasury, or provided for by taxes already levied.

The complaint in this case shows funds in the treasury of the city of Madison, provided for by taxation or otherwise, amounting to upwards of \$50,000; that of this amount the sum of \$44,000 is appropriated for the payment of interest upon the city indebtedness, and for other necessary purposes of the city, amongst which is

the item, "fire, \$6,000;" and that, at the date of the contract for the fire alarm telegraph, about \$28,000 of these current revenues were unexpended. It does not appear from the complaint whether any part of the \$6,000 appropriated for fire had been expended; nor does it appear whether any use had been made up to that time of the revenues over \$44,000 which had not been expressly appropriated by the common council. As the city authorities judged it to be in the interests of the municipality to procure the fire alarm telegraph system as a part of the current expenses for fire protection, and as the amount thus to be expended was within the sum expressly appropriated for fire, we cannot see that the constitutional provision against municipal indebtedness beyond the prescribed limit has been violated.

Some question is made by counsel as to whether the proceedings of the Legislature in relation to the submission to the people of the article of the constitution limiting municipal legislation, were in all respects formal and correct. That article has now been in force and unquestioned by any one for over twelve years. If we may go back twelve years to consider such a question, why may we not go back forty years to the adoption of the constitution itself? It is not denied that the final action of each house preliminary to the submission of the article to the people was in every case duly authenticated by the proper officers, nor is any doubt expressed that the article when so submitted was sanctioned by the votes of a majority of the electors of the State. It is also to be remembered that it is the vote of the people, and not the action of the Legislature, that gives vitality to the constitution and its amendments.

We have not, however, found it necessary to the decision of this case that we should consider the ques-

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tion so raised, and only thus refer to it in deference to the earnest argument of counsel.

We find no error in the record.

The judgment is affirmed.

Filed January 25, 1894.

NOTE.—The numerous and somewhat conflicting authorities as to what constitutes an indebtedness within the meaning of restrictions on municipal debts, are collected in a note to *Beard v. Hopkinsville* (Ky.), 23 L. R. A. 402.

ON PETITION FOR REHEARING.

HACKNEY, C. J.—The appellants, with much earnestness and ability, have claimed a rehearing in this case, and we have given the questions involved a careful consideration. If our judgment of the propriety and wisdom of the expenditure proposed by the appellee were the proper guide to our conclusion upon the legal questions before us, the original opinion would have been with the appellants, and most certainly that judgment would lead us to grant the rehearing now asked. But, as said in that opinion, we are not permitted to judge of the wisdom or expediency of the expenditure, and if those whose servants are about to make the expenditure, are dissatisfied, they must resort to another, and not to a judicial tribunal. The chief contention of the appellants is that the court failed to distinguish between the ordinary current expenses of the city, and those for betterments or unusual purchases, and that, while current expenses may possibly be met, to the postponement of the debts of the city, contracted to the constitutional limit, such betterments may not be paid for from current revenues, where such debt limit has been reached. The theory of the original opinion is that to sustain the suit, the appellants were required to show that the

maximum debt limit, as prescribed by the constitution, had been reached, and that the city was about to create an additional debt, and that they had failed to so show this. This failure, it was held, was due to the fact that it was not proposed to create a debt, but simply to make a cash purchase, the city having in its treasury the funds with which to pay therefor. From this theory we are not inclined to depart, if the facts alleged support it, and, if it is supported, the distinction contended for is not for our consideration, since it would only arise where the effort sought to be restrained is the creation of a debt in excess of the constitutional limit. The original opinion shows very clearly and correctly, we think, that the city had current revenues sufficient to pay for the alarm system, and not create a debt for it. In fact, counsel call attention to the sale of personal property, by the city, for \$3,000.00, not specially mentioned in the original opinion, which, together with the \$1,618.00, for which real estate was sold, would require but a small fraction of the current expense appropriations, or other moneys not appropriated, to pay for the system, the revenues alone exceeding appropriations nearly \$6,000. Appellants seek to avoid the inference that the city obtained and retained the purchase-price of the property sold. We regard it as the natural and necessary inference from the allegations of sales. It is also claimed that the court should not have indulged the presumption, in the absence of an allegation to the contrary, that sums appropriated had not been expended, and that, under the rules of pleading in such cases, it was not necessary to allege facts within the knowledge of the adversary. The true rule, as we understand it, is that facts peculiarly within the knowledge of the party against whom they should be pleaded, and not accessible

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to the pleader, may be dispensed with, but this may not be done without showing that such facts are so peculiarly within the knowledge of the opposite party, and not accessible to the pleader. If this were not the rule, a pleading, though a mere shadow, would be sufficient. Under our code, the burden rests upon the pleader to state in a plain and concise manner, the facts requiring the relief demanded, and to be excused from this duty, he must allege that such facts are beyond his reach, and not within his knowledge. It is a familiar rule that pleadings are to be construed most strongly against the pleader, and that if alleged conduct is reasonably susceptible of honest and lawful construction, that construction shall be given it. It was upon this rule that the appellants' complaint was construed in favor of the presumption that moneys were in the treasury unexpended, and that to remove such presumption, they should have alleged the contrary.

We have examined the cases cited by counsel, and have not been moved in our convictions, as expressed in the original opinion, and as confirmed by the recent cases of *Foland v. Town of Frankton*, 142 Ind. 546, and *Seward v. Town of Liberty*, 142 Ind. 551. Being entirely satisfied with the correctness of our conclusions, we cannot follow counsel in their very extended discussion. The petition for a rehearing is overruled.

Filed December 12, 1895.

The City of Huntington v. Mahan.

No. 17,691.

142	695
157	179

THE CITY OF HUNTINGTON v. MAHAN.

MUNICIPAL CORPORATION.—*City Ordinance Against Peddling Without License.—Distributing Agent.—Interstate Commerce.*—A city ordinance prohibiting peddling without a license is an unlawful interference with interstate commerce as to a salaried distributing agent of a publishing firm in another State, where orders for books in several localities are sent to such firm by another salaried agent, and on being received by the latter are repacked and shipped to various localities for distribution. (See note at end of opinion.)

From the Huntington Circuit Court.

Kenner & Lesh, for appellant.

E. E. Stevenson, for appellee.

HACKNEY, J.—The appellee was charged and found guilty, before the appellant's mayor, of violating an ordinance of the city prohibiting peddling within said city without a license, as prescribed by said ordinance. On appeal to the circuit court there was a special answer by the appellee, a demurrer to which was overruled, and a special reply by the appellant, a demurrer to which was sustained, and upon a trial by the court the appellee was acquitted. The questions arising upon the rulings as to the special answer and special reply more fairly and fully arise upon the motion for a new trial which assigned, as causes therefor, that the finding was contrary to law and was contrary to the evidence. Without conflict the evidence established the following facts: During and prior to September and October, 1894, P. F. Collier & Co. were a firm of book publishers, located in and conducting their business, throughout various States, from the city of New York, in the State of New York.

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In said months said firm had an agent, P. J. Flanady, located in the city of Indianapolis and had other agents traversing the various parts of this State soliciting purchasers and taking orders for the books so published by said firm and acting solely as the salaried agents of such firm. The Indianapolis agency, after receiving the orders for such books as the canvassing agents might secure, would combine numbers of such orders and forward them to P. F. Collier & Co., at New York City, which firm, in response to such orders, would ship to the Indianapolis agency, from New York City, the books so ordered. When the books so ordered and shipped were received at Indianapolis they were repacked in parcels to suit the orders from the various localities in Indiana and were shipped to such localities for distribution by salaried agents acting for P. F. Collier & Co., in such localities. The appellee, while acting as such distributing agent at the city of Huntington, on the 5th day of October, 1894, and while distributing to various purchasers such books, of the publications of said firm, as had been ordered by the citizens of said city, through one Gamble, another agent of said firm, during the month of September, 1894, was arrested for the violation of said ordinance. The books, being delivered by the appellee, had been received by him through orders and shipments as above described, and had not, prior thereto, gone into storage or become a part of the stock in trade in any business conducted wholly within this State.

The theory upon which the appellee was discharged by the lower court and that upon which the judgment of that court is here supported is that the appellee was engaged in interstate commerce, the regulation of which is reserved, by the federal constitution, to the Congress of

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the United States and which is not the subject of regulation or restriction by State or municipal authority.

In the recent case of *City of South Bend v. Martin*, 142 Ind. 31 (29 L. R. A. 531), the question here presented was fully considered and many of the Federal and State decisions were reviewed. The rule there recognized was that if the goods, prior to their sale, had come into this State and had become here permanently fixed and mingled with the mass of property within this State, and, as such, were subjected to sale by present exposure and delivery their sale was not a transaction of interstate commerce, while, if they had not, at the time of their sale, come into this State, had not become mingled with the mass of property within this State, were not subject to inspection and delivery at the time of the sale, the soliciting of orders and the subsequent shipment and delivery from another State were transactions of interstate commerce. Upon this recognized rule there can be no doubt, under the facts here presented, that this case falls within the limits where State and municipal authorities have no control. In addition to the numerous cases cited in *City of South Bend v. Martin*, *supra*, see *In re Spain*, 47 Fed. Rep. 208; *In re Nichols*, 48 Fed. Rep. 164; *In re Tyerman*, 48 Fed. Rep. 167; *McLaughlin v. City of South Bend*, 126 Ind. 471; *Martin v. Town of Rosedale*, 130 Ind. 109.

The right of Congress to regulate interstate commerce "is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of the State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered." *Brennan v. Titusville*, 153 U. S. 289; *Leisy v. Hardin*,

The Pennsylvania Co. v. The State.

135 U. S. 100; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419. The right to deliver goods sold when not within the State has the same immunity from State or municipal interference, by way of taxation, as the sale itself has. *In re Spain*, *supra*.

We conclude, therefore, that the record discloses no error, and the judgment of the circuit court is affirmed.

Filed December 12, 1895.

The effect of the interstate commerce law upon State regulations as to peddlers is the subject of a note to *Re Spain*, 14 L. R. A. 97; see also *South Bend v. Martin* (Ind.), 29 L. R. A. 531.

No. 17,218.

WILKINS v. HARE.

From the Marion Circuit Court.

Julian & Julian, for appellant.

JORDAN, J.—The same question is involved in this appeal as was in the case of appellant against Hyde et al., 142 Ind. 260, and upon the authority of that decision the judgment in this cause is affirmed.

Filed October 16, 1895.

No. 16,921.

THE PENNSYLVANIA CO. v. THE STATE.

From the Jennings Circuit Court.

B. K. Elliott, W. F. Elliott and S. Stansifer, for appellant.

W. A. Ketcham, Attorney-General, for State.

HACKNEY, J.—This was an action for penalties incurred in failing to note upon blackboards the time for the arrival of trains at stations

Cowan v. Board of Commissioners of Adams County.

on the line of the appellant's railway, as required by the act of March 9th, 1889 (R. S. 1894, sections 5186, 5187). The questions here involved are identical with those involved in *Pennsylvania Co. v. State*, 142 Ind. 428, and upon the authority of that case the judgment of the circuit court in this case is affirmed.

Filed November 6, 1895.

No. 17,452.

GOODWIN, CLERK OF THE CITY OF TERRE HAUTE, v.
STATE, EX REL. FOLEY.

From the Vigo Circuit Court.

J. E. Piety and *J. O. Piety*, for appellant.

T. W. Harper, *V. J. Barlow*, *J. C. Foley* and *P. M. Foley*, for appellee.

MONKS, J.—The questions presented in this cause are in all respects the same, and the parties the same as in the case of *Goodwin, etc.*, v. *State, ex rel.*, 142 Ind. 117.

On the authority of which case, the judgment is reversed, with instructions to overrule the demurrer to the second and third paragraphs of answer, and for further proceedings not in conflict with this opinion.

Filed September 26, 1895.

No. 17,551.

COWAN v. BOARD OF COMMISSIONERS OF ADAMS COUNTY.

From the Adams Circuit Court.

S. Peterson and *C. J. Lutz*, for appellant.

R. K. Irwin, for appellee.

MONKS, J.—This was an action by appellant against appellee to recover damages alleged to have been sustained by her on account of the negligence of appellee in failing to keep the approach to a bridge in repair.

Roby et al. v. The State, ex rel. Matthews, Governor.

After issue joined the cause was tried by a jury, and a verdict returned in favor of the appellee, and, over a motion for a new trial, judgment was rendered against appellant. This court held in the case of *Board of Commissioners of Jasper County v. Allman, Admr.*, 142 Ind. 578, this term, that counties were not liable for the negligence of the board of county commissioners in failing to keep bridges in repair. On the authority of that case this case is affirmed.

Filed November 26, 1895.

No. 17,744.

ROBY ET AL. *v.* THE STATE, EX REL. MATTHEWS, GOV.

From the Lake Circuit Court.

J. W. Youche, Olds & Griffin and *E. Roby*, for appellant.

W. A. Ketcham, Attorney-General, for appellee.

MCCABE, J.—This is an appeal from an interlocutory order granting a temporary injunction on the complaint of the appellee against the appellant, under the act of the General Assembly, approved March 5th, 1895, regulating horse racing. The errors assigned and the appellant's brief present exactly the same questions, and no other than those considered and decided by this court in *State, ex rel. Duensing, v. Roby*, 142 Ind. 168. We are still satisfied that that case was rightly decided. On the authority of that case, the judgment must be and is affirmed.

Filed December 10, 1895.

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See MANDAMUS, 3 ; MUNICIPAL CORPORATION, 18 ; OFFICE AND OFFICER, 3.

1. **Order Granting Aid to Railroad Company. — Irregular Session. — Void. — Collateral Attack. — Injunction.** — An order of the board of county commissioners granting aid to railroad companies by townships within the county, of which matter such board has exclusive original jurisdiction, will not be held void on collateral attack on the ground that the meeting at which such order was made was irregular, where all the members of the board were present at the place provided by law for their meeting, and at a time when they could have convened in special session upon call.

Jones, Treas., v. Cullen, 335

2. **Order Granting Aid to Railroad Co.—Action to Set Aside.—Laches.**—An order of the board of county commissioners granting aid to a railroad company will not be set aside at the instance of one who waits three years before seeking relief, and until the railroad company, in consideration of the donation, has expended money in the construction of the road. *Ib.*

COUNTY SHERIFF.

See OFFICE AND OFFICER, 1, 2, 3.

COURTS.

Continuance of Sitting After Term Time.—Trial.—A continuance of the sitting of court in an action beyond the term at which it was commenced, is authorized by R. S. 1894, section 1442, where it is impossible to complete it before the expiration of the term.
McDonald v. McDonald, 55

CRIMINAL LAW.

See INSTRUCTIONS TO JURY, 5; MANDAMUS, 3.

1. *Jeopardy.—Civil Remedy in Addition to Criminal.—Injunction.*—A suit for an injunction against the violation of a statute and punishment for contempt of such an injunction, in addition to a criminal prosecution for the illegal act, do not violate the constitutional provision against putting a person twice in jeopardy for the same offense.
State, ex rel., v. Roby, 168
2. *Reasonable Doubt.—Evidence Insufficient.*—A conviction will not be affirmed where the evidence leaves standing a reasonable hypothesis of innocence.
Hamilton v. State, 276
3. *Larceny.—Evidence Insufficient.*—A conviction of theft of money is not justified by evidence that the accused without apparent necessity pressed against the prosecuting witness while standing at the bar of a saloon, and afterwards resisted arrest, where there were a number of men in the saloon at the time, and the loss was not discovered until after the prosecuting witness had left the saloon and gone to another place where he might have lost the money.
Ib.
4. *Larceny.—Information.—Intent.*—The omission from an information for theft, of an allegation of an intent to deprive the owner of the property stolen, does not render it defective, where the charge is substantially in the language of section 2007, R. S. 1894, and qualifies the taking as felonious.
Ib.
5. *Homicide.—Self-defense.*—The law will not, as a general rule, excuse one who repels a blow with the fist by stabbing his assailant.
Smith v. State, 288
6. *Arson.—Indictment.—Description of Property.*—An averment in an indictment for arson, describing the property burned as a certain mill-house "of" persons named, sufficiently describes the property as a building and as belonging to the persons named, under section 2000, R. S. 1894, providing that whoever willfully and maliciously burns any dwelling house or other building being the property of another is guilty of arson.
Jordan v. State, 422

CROSS-COMPLAINT.

See DEMAND.

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See EVIDENCE, 22 (Mitigation of Damages); PLEADING, 8; RAILROAD, 14; SCHOOL CORPORATION.

DECEDENTS' ESTATES.

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See CONVEYANCE; EVIDENCE, 19; INTERROGATORIES TO JURY; PLEADING, 6.

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DEFAULT.

See MORTGAGE, 1, 2.

DEFENSE.

See ANSWER; COMMON CARRIER; DEMURRER.

Action by State to Recover Penalty.—Constitutional Law.
—The violation of Ind. Const., article 8, sections 2 and 3, providing that fines assessed for breaches of the penal laws of the State and all forfeitures which may accrue, shall constitute a part of the common-school fund, by the provision of a penal statute, is not available in defense of an action by the State for the recovery of the penalty prescribed by such statute.

Pennsylvania Co. v. State, 423

DELIVERY, CONSTRUCTIVE.

See SALE, 1.

DEMAND.

Note.—Payment of Excessive Interest.—Answer.—Cross-Complaint.
No demand is necessary before an answer, in an action on a note, claiming payment of excessive interest under a mistake as to the contract rate.

Stotsenburg, Admr., v. Fordice, 490

DEMURRER.

See ASSIGNMENT OF ERRORS, 3 ; PLEADING, 2, 3, 6, 9.

Sustaining to Paragraph of Answer. — Same Defense Admissible Under Another Paragraph. — A demurrer to a paragraph of an answer setting up the statute of limitations to a single paragraph of the complaint is properly sustained where another sufficient paragraph sets up the same statute in answer to the whole complaint, and particularly to the paragraph in question—especially where a demurrer to the only other paragraph of the complaint has been sustained.

Moore v. Morris, 354

DEPOSITION.

See APPELLATE PROCEDURE, 13.

1. *Cross-Examination Admissible in Evidence.* — One who has attended the taking of the deposition, and cross-examined the witness, has no power to exclude the reading of the cross-examination as a part of the deposition. *Memphis, etc., Co. v. Pikey, Admr., 304*
2. *Evidence. — Rebuttal. — Payment.* — Depositions containing evidence tending to rebut evidence given by defendant under a plea of payment may be read to the jury in rebuttal.
Miller v. Preble, Admr., 632
3. *As Evidence in Rebuttal. — Abuse of Discretion.* — Permitting depositions embracing evidence in chief only to be read in rebuttal is not necessarily an abuse of discretion. *Ib.*

DESCRIPTION.

See CRIMINAL LAW, 6 ; FRAUD ; WILL, 1.

DISAFFIRMANCE.

See INFANT, 1; REAL ESTATE.

DISCRETION.

See APPELLATE PROCEDURE, 1; DEPOSITION, 8; SPECIAL FINDING, 2; STATUTE, 3.

DOG LAW.

See STATUTE REPEALED.

DRAINAGE.

See COSTS ; JUDGMENT.

1. *Remonstrances.—Refiling as to New Report.*—Remonstrances filed to the original report of drainage commissioners, are not good without refiling, as against a new report, under R. S. 1894, section 5625, providing that on sustaining a remonstrance the court may direct amendment of the report, or a new report, and that any person whose lands are reported as affected, “may remonstrate” against the new report within the same time as against the first report. *West Creek Tp. v. Miller, 210*
2. *New Report.—Notice.—Remonstrance.*—Lack of knowledge or notice of the filing of a new report by drainage commissioners is no excuse for the failure of one who remonstrated against the first report, to file remonstrances against the new report. *Ib.*
3. *Remonstrances.—Original Report.—New Report.*—Drainage commissioners do not recognize remonstrances to their original report, and so make them good, as against a new report, by moving to strike them out after making such new report. *Ib.*
4. *Issues.—Admission.—Swearing of Witness.*—The swearing of a witness by direction of the court, in drainage proceedings, is not an admission by the petitioners that issues are made up so as to make a remonstrance to the original report of the drainage commissioners good, as against a new report by them. *Ib.*
5. *Report.—Omission as to Grades, Courses, and Distances.—Referring Back.*—The omission from a report of drainage commissioners, of matters as to grades, courses, and distances of the proposed ditch, which are required to be stated therein by R. S. 1894, section 5624, authorizes a reference back for revision of the report as “not according to law.” *Ib.*
6. *Portion of Benefits Never Assessed or Called for Cannot Be Applied to New Work.—Statute Construed, Section 5648, R. S. 1894.*—The portion of the benefits found to have resulted from the construction of a drainage ditch, never assessed or called for, for the construction according to the plans and specifications, cannot be applied to new work, under R. S. 1894, section 5648, providing for the expenditure of funds collected on assessments in excess of the amount necessary to complete the ditch for opening the channel or increasing the levee. *Reamer v. Hogg, 138*
7. *Statute Amended Pending Action.—Abatement.*—A proceeding for the establishment of a drain, instituted under sections 4285–4317, R. S. 1881, did not abate upon the amendment of such sections, pending the proceedings, by the passage of the act of 1893, p. 329, but thereafter the proceedings were governed by the provisions of the amendatory act. *Steele v. Empson, 397*
8. *Drain Across Railroad Right of Way.—Who May Object.*—A property-owner cannot complain of the location of a public drain established under the statutes of this State, across the right of way of a railroad; but such objection must be made, if at all, by the railroad company. *Ib.*

9. *Questions Not Considered on Appeal.*—Questions not properly presented to the board of commissioners in proceedings for the establishment of a drain cannot be raised upon appeal to the circuit court, unless they go to the jurisdiction over the subject-matter. *Ib.*
10. *Assignment of Error.—Remonstrance.—Pointing Out Items on Which Evidence Will Be Admitted.—Practice.*—No question is presented by an assignment that the court erred in indicating certain items in a remonstrance in a proceeding for the establishment of a drain under the statutes, upon which the remonstrants would not be permitted to introduce evidence; but the question of the admissibility of evidence as to such items must be raised by an offer of evidence and an exception to the refusal to admit the same. *Ib.*

EASEMENT.

See PLEADING, 14, 15.

EJECTMENT.

See RECEIVER, 7.

1. *Burden of Proof.*—The burden of establishing, by affirmative proof, his title and right to possession, is upon plaintiff, in an action to recover possession of land.
Pittsburgh, etc., R. W. Co. v. O'Brien, 218
2. *Complaint, Necessary Averment.*—A complaint in an action to recover possession of land is fatally defective, where it fails to allege, as required by section 1066, R. S. 1894, that the plaintiff is "entitled to possession." *Ib.*

ELECTIONS.

See APPELLATE PROCEDURE, 18.

1. *Evidence.—Ballots Properly Preserved.—Memorandum Omitted from Tally Sheet.*—The omission from the tally sheet of the memorandum required by section 6248, R. S. 1894, as to disputed ballots, does not preclude a ballot preserved in the manner provided by that section for the preservation of disputed ballots, from admission in evidence. *Zeis v. Passwater, 375*
2. *Ballot.—Distinguishing Mark.*—A distinct mark, as with a pencil, about one-fourth inch in width and about five-sixteenths inch in length, on one of the large squares of a ballot, is a distinguishing mark within the election law of this State. (See note at end of opinion.) *Ib.*
3. *Ballot.—Distinguishing Mark.*—That the impression of the stamp within the square on a ballot, containing the voter's party emblem, is somewhat blurred, as if made by a tremulous hand, does not require the exclusion of the ballot as containing a distinguishing mark, under the election law of this State. *Ib.*
4. *Ballot.—Distinguishing Mark.*—Two entirely separate and distinct impressions of the stamp within the square, on a ballot, containing the emblem of the voter's party, constitute a distinguishing mark within the election law, invalidating the ballot. *Ib.*

EMINENT DOMAIN.

Appropriating Public Property to a Second Public Use.—The rule that property appropriated to one public use cannot be appropriated to another public use, applies only when the second public use will naturally injure or destroy the first public use.

Steele v. Empsom, 337

ESTOPPEL.

See APPELLATE PROCEDURE, 2 ; EVIDENCE, 1 ; MUNICIPAL CORPORATION, 9 ; RAILROAD, 8, 9, 10.

1. *Contest of Will. — Advancement. — Heir.* — A daughter is not estopped to contest her father's will, because of a conveyance of land by him to her, in the nature of an advancement, in consideration of which she agreed to make no claim against his estate.
Bower v. Bower, 194
2. *Married Woman. — Surety. — Mortgage. — Note.* — A wife is not estopped to deny that she executed notes and a mortgage as surety merely for her husband, by a recital in the mortgage that the mortgagors convey the real estate and also the stock of goods, which was the consideration of the notes, that "we" have purchased from the mortgagee, and that "we" acknowledge that we own the real estate in equal shares, where she had nothing to do with the sale except to sign the notes and the mortgage at the request of her husband after it was consummated.
Cole v. Temple, 498
3. *Married Woman. — Equitable Owner of Land. — Legal Title in Husband.* — A married woman who is the equitable owner of a tract of land, the title to which she knows to be in her husband, is estopped to set up her ownership as against creditors of the husband, who gave the credit on the faith of his ownership of the land.
Pierce v. Hower, 626

EVIDENCE.

See APPEAL, 1 ; APPELLATE PROCEDURE, 4, 14, 18, 26, 27, 28, 31 ; BILL OF EXCEPTIONS, 3 ; BURDEN OF PROOF ; CONTRACT, 6 ; CRIMINAL LAW, 2, 3 ; DEPOSITION, 1, 2, 3 ; ELECTIONS, 1 ; HARMLESS ERROR ; INSTRUCTIONS TO JURY, 4, 5, 8 ; NEW TRIAL, 1, 2 ; PRESUMPTION ; RAILROAD, 1, 4 ; WILL, 7.

1. *Admission Of. — Estoppel.* — A party cannot complain of the admission of evidence, the substance of which he has elicited by another question.
McDonald v. McDonald, 55
2. *Statement to the Court of Alleged Privileged Communications. — Practice.* — A statement to the court in the absence of the jury, of alleged privileged communications, is not prejudicial error.
Ib.
3. *Will. — Contest. — Forgery.* — Contestants of a will, on the ground that it is a forgery, need not specifically show the identical person whose hand perpetrated the forgery.
Ib.
4. *Expert Witness. — Signature.* — An expert witness may give his opinion as to the genuineness of a signature, based upon facts to which he has testified.
Ib.
5. *Confidential Communications. — Attorney and Client. — Will.* — Explanatory statements by a widow to an attorney, of the reasons for her husband changing his will, made after he had disposed of certain matters, in which she had sought his professional advice, are not within R. S. 1894, section 505, excluding "confidential communications made to attorneys in the course of their professional business."
Ib.
6. *Lost Will. — Declarations of Testator.* — Declarations of a testator, shortly before his death, as to his manner of disposing of his property, are admissible to show the contents of an alleged lost

will, and whether it remained unrevoked at his death, where the existence of such lost will must be proved to establish the right of the contestants of another will to maintain their action. *Ib.*

7. *Parol.—Inadmissible to Extend Effect of Written Contract.*
—Parol evidence is inadmissible to extend the effect of a written contract to abrogate a prior agreement beyond the terms of such contract where it is complete and there is no apparent ambiguity therein that requires an explanation.
Sandage v. Studabaker Bros. Mfg. Co., 148
8. *Notice.—Admissions.—Mining Boss.—Personal Injury of Servant.—Dangerous Condition of Mine.*—Upon the issue as to knowledge, by a mining company, of the defect in the roof of the mine, which caused an injury to an employe, evidence that after the accident the mining boss admitted that he had been notified of the defect, is inadmissible in the absence of evidence, offered or given, that at the time of the admission the latter was engaged in the discharge of any duty owing to the company, or that he was transacting any business for it whatever.
Treager v. Jackson, etc., Co., 164
9. *Physician and Patient.—Mental Capacity.*—A physician, employed by testator, may testify as to facts in regard to the latter's mental capacity, learned or observed by him in a conversation with him, after the services were rendered, when he called upon him to collect his bill.
Bower v. Bower, 194
10. *Statements of Testator.—Mental Condition.—Will.*—Statements of a testator, three or four years before the execution of the will, tending to show his mental condition, may be given in evidence by a non-expert witness, as a basis for an opinion by her as to his competency to make the will. *Ib.*
11. *Will.—Mental Capacity.—Declarations of Testator.*—The declarations of a testator, on the subject of making wills, are competent, on a contest of his will, on the ground of mental incapacity. *Ib.*
12. *Will.—Mental Capacity of Testator.—Tax Lists.*—Evidence that a testator, for several years before his death, did not make out his own tax-lists, but that they were made out and sworn to by his son, is admissible on the question of the testator's testamentary capacity. *Ib.*
13. *Will.—Mental Capacity.*—A witness may testify to facts, tending to show the mental incapacity of a testator, although he gives no opinion as to the latter's sanity. *Ib.*
14. *Motion to Strike Out, When Made Too Late.*—A motion to strike out evidence introduced on direct examination is too late when first made at the close of the cross-examination. *Ib.*
15. *Erroneous Admission Of.—Withdrawal.—Error Cured.—Appellate Procedure.*—Error in the admission of improper evidence is cured by a complete withdrawal of it from the jury, and an explicit direction to disregard it, where the party complaining does not show that in spite of its withdrawal, and the admonition to disregard it, the erroneous evidence prejudiced him with the jury.
Shepard v. Goben, 318
16. *Relevancy.—Agency.*—Evidence, the relevancy of which is dependent upon the existence of an agency, may be admitted upon the express undertaking of the party offering it to disclose the relation of agency, where some evidence has already gone to the jury, tending to establish such agency. *Ib.*

17. *Conveyance.—Mental Incapacity of Grantor.—Presumption.—*
The mental incapacity of a grantor, accompanied with and probably due to the infirmities of old age, and decrepitude, will be presumed to have continued from the date of the execution of the deed in question until his death, occurring about one month thereafter.
Raymond v. Wathen, 367
18. *Nonexpert. — Opinion. — Physical and Mental Condition of Another.—*A nonexpert witness may state his opinion as to the mental condition of another, in connection with a statement of the facts upon which it is based, if such facts show that he is acquainted with the person, has had opportunity to observe him, and has observed him.
Stumph v. Miller, 442
19. *Mental Condition of Grantor Preceding Date of Execution of Deed.—*The mental condition of the grantor a few months preceding the date of the execution of a deed may be shown under an allegation of mental incapacity to execute the same, due to extreme age and to sickness extending back of the time to which the evidence relates.
Ib.
20. *Special Finding, When Not Sustained.—Building and Loan Stock.—Assessment.—*A finding that there is due plaintiff in principal and interest, on a note in suit, a specified sum, is not sustained by evidence showing that the suit was brought to recover an assessment made by plaintiff on defendant's stock, and not upon any unpaid principal or interest.
Cummings v. Citizens, etc., Assn., 600
21. *Parol.—Of Statements Made on Examination and Taken Down in Shorthand, and Signed by the Party.—*Parol evidence is admissible of statements made by one of the parties in an examination which was taken down in shorthand only, and does not appear to have been taken before an authorized officer, although it was signed by such party.
Miller v. Preble, Admr., 632
22. *Specific Acts of Intoxication.—Mitigation of Damages.—Death.—*Evidence of specific acts of intoxication on the part of plaintiff's intestate is admissible in an action for negligently causing his death, in mitigation of damages.
Wright, Admr., v. City of Crawfordsville, 636
23. *Exclusion.—Sparks from Railroad Engine.—*Exclusion of evidence as to how a witness knew that sparks emitted from defendant's engine were alive is harmless, if error, where he testifies that he has seen live sparks thrown a specified distance.
White v. New York, etc., R. R. Co., 648

EXCEPTION.

See APPELLATE PROCEDURE, 21.

EXHIBIT.

See PLEADING, 1.

EXPERT WITNESS.

See EVIDENCE, 4.

FEES AND SALARIES.

See STATUTE, 2.

*Salary of Township Trustee, for Overseeing the Poor, Payable from County Treasury.—*The salary of a township trustee, acting as overseer of the poor, is payable from the county treasury, and is

not a charge against the township fund, as the acts of 1879, p. 142, directing payment for such services out of the county treasury, was not repealed by the acts of March 6, 1889, March 7, 1891, and March 4, 1893, providing that each trustee shall receive a specified sum per day in full compensation for all services performed by him in any capacity. *Kerlin v. Reynolds*, 460

FORGERY.

See EVIDENCE, 3.

FRAUD.

See BURDEN OF PROOF; CONTRACT, 6; INJUNCTION, 7; INSTRUCTIONS TO JURY, 10; PLEADING, 16.

Real Estate.—Description.—Number of Acres ("More or Less").—Sale.—The qualification of a description in a land contract as to the number of acres sold by the words "more or less," does not preclude the purchaser from recovering for fraud of the vendor in representing that the tract contained the number of acres specified. *Moore v. Harmon*, 555

GAS COMPANY.

See INJUNCTION, 6.

GUARANTOR.

See REVIEW OF JUDGMENT, 1.

GUARDIAN, FOREIGN.

See GUARDIAN AND WARD.

GUARDIAN AND WARD.

Ward Escaping From Another State to This.—Foreign Guardian Cannot be Mandated by Court of This State as to Education of Ward.—A guardian residing in Missouri, who is an exemplary man in all respects, and furnishes the ward, who resides in such State, with opportunities for a good education therein, cannot be compelled in this State, to which State the ward is induced to run away by his sister, who is only twenty-two years old, and for other reasons wholly unfit to have the custody of such ward, to send the latter to school in another State, under Mo. R. S. 1889, section 5297, giving the guardian control of the person of the ward, and the care of his education, support, and maintenance. *Grimes v. Butsch*, 113

HARMLESS ERROR.

Evidence.—The admission of improper evidence which only tends to prove a fact otherwise clearly shown by competent evidence, is harmless error. *Stumph v. Miller*, 442

HAWKER.

See MUNICIPAL CORPORATION, 1, 2.

HEIR.

See ESTOPPEL, 1.

HIGHWAY.

See ROADS.

HOMICIDE.

See CRIMINAL LAW, 5.

HORSE RACING.

See CONSTITUTIONAL LAW, 3; STATUTORY CONSTRUCTION, 4.

Prohibition Of.—Statute Construed.—Change of Persons, Companies, Associations, or Corporations.—A change of the persons, companies, associations, or corporations who hold race meetings on the same track, does not relieve from or avoid the prohibition of the act of 1895, against holding race meetings more than three times in a year, or twice in sixty days, or with less than thirty days intervening. *State, ex rel., v. Roby, 168*

HUSBAND AND WIFE.

See CONTRACT, 4; MARRIED WOMAN; PLEADING, 16; WITNESS, 4.

IDEM SONANS.

See APPELLATE PROCEDURE, 12.

IMPEACHMENT.

See INSTRUCTIONS TO JURY, 5, 9.

INDICTMENT.

See CRIMINAL LAW, 4, 6.

INDORSER.

See REVIEW OF JUDGMENT, 1.

INFANT.

See PLEADING, 2; REAL ESTATE.

1. *Sale of Real Estate. — Disaffirmance. — Restoring Purchase Price.*—An infant need not, under sections 3364–3365, R. S. 1894 (sections 2944–2945, R. S. 1881), on disaffirming a sale of his real estate, on attaining his majority, restore or tender the purchase price of the premises received by him, unless at the time of the sale he falsely represented himself to have attained his majority. (See note at end of opinion.) *Gillenwaters v. Campbell, 529*
2. *A Personal Privilege. — Rule as To.—Assignment.—Contract.*—The rule that infancy is a personal privilege, and not assignable to the privy for the avoidance of contracts, applies only to privy of estate; a privy in blood may avoid the voidable contract of an infant or insane person, *Ib.*

INJUNCTION.

See APPELLATE PROCEDURE, 15; CONSTITUTIONAL LAW, 1; CONTRACT, 5; COUNTY COMMISSIONERS, 1; CRIMINAL LAW, 1; PLEADING, 10.

1. *Complaint, Necessary Allegation. — Taxes.*—The complaint in an action to enjoin the collection of taxes, part of which are admitted to be legally due, must allege that a tender of such amount was made, and that it was kept good by paying the same into court. *Bundy v. Summerland, Treas., 92*
2. *Want of Equitable Jurisdiction. — Dismissal. — Action to Enjoin Execution and Judgment.*—A suit to enjoin an execution and judgment cannot be dismissed on the ground of a want of equity jurisdiction, because there is a remedy at law, where the same

judge, under a reformed system of procedure, exercises both law and equity powers, and the facts show a right to legal relief, which can be granted on amendment of pleadings.

Michener v. Springfield, etc., Co., 130

3. *Against Judgment at Law.—Legal Remedy.*—An injunction against the enforcement of a judgment at law cannot be granted where there is a legal remedy by review, in a code proceeding which is as practicable and efficient. *Ib.*
4. *To Restrain Prosecution of Several Actions in Another State to Avoid Statute of This State.—All Parties Residents of This State.*—The right to an injunction to restrain the prosecution of several actions on a contract for the recovery of different installments, commenced in the court of another State for the purpose of avoiding a statute of the State of the residence of the parties, affecting the validity of the contract, is not defeated by the fact that complainant has other legal defenses available in the foreign jurisdiction. *Sundage v. Studabaker Bros., Mfg. Co.*, 148
5. *To Restrain Prosecution of Several Actions in Foreign State.—All Parties Residents of This State.—Assignee.*—A party to a contract is entitled to an injunction restraining the prosecution of several actions for the recovery of different installments thereunder, commenced by the assignee of the other party in the court of a foreign State for the purpose of avoiding a statute of the State in which the contract was made and to be performed, and in which both the parties and such assignee reside. *Ib.*
6. *Gas Company.—Use of Streets for Pipes.—Ordinance.—Maximum Price of Gas.*—A gas company which uses the streets of a town for laying its pipes under general permission therefor contained in an ordinance under section 4306, R. S. 1894, limiting the price to consumers to a certain maximum, will be enjoined from charging a consumer more than such maximum. *Westfield Gas and Milling Co. v. Mendenhall*, 538
7. *Contract for Lighting Streets of a Town.—Fraud.—Price.—Gas Company.*—A town will not be enjoined from making a contract for lighting its streets with gas on the ground of fraud, simply because the price to be paid is three times that paid by private consumers, where it does not appear that the gas plant was sufficient to furnish the necessary gas, or that it can be obtained elsewhere for a less amount, or that the gas to be furnished the town is of the same quality as that furnished to private consumers. *Seward v. Town of Liberty*, 551

INSTRUCTIONS TO JURY.

See APPELLATE PROCEDURE, 3, 10, 26, 28; WILL, 8.

1. *Refusing.—Given in Substance.*—An instruction, accurately stating the law, is properly refused where another instruction substantially similar has been given. *McDonald v. McDonald*, 55
2. *Railroad.—Passenger.—Necessary Proof.*—An instruction requiring it to appear by a fair preponderance of the evidence, that plaintiff was a passenger, and not a trespasser, on defendant's train, to entitle him to recover, is proper, where the pleadings make such theory possible, if he was upon defendant's train, and the evidence shows that he was not seen by the conductor and other trainmen who would have had opportunities to see him if he had been openly on the train. *Pfaffenback v. Lake Shore, etc., R. W. Co.*, 246
3. *Rejected Offer to Prove.*—An instruction that the jury should not consider as evidence mere offers to make proof, which offers are rejected, is properly refused. *Ib.*

4. *As to Consideration of Evidence by Jury.*—An instruction that the burden of proof is upon plaintiff to establish his cause of action by a preponderance of the evidence, and that in determining on which side the preponderance lies, the jury may consider the conduct and demeanor of the witnesses, their opportunities for knowing, their interest or lack of interest in view of all the “other evidence, facts and circumstances” proved on the trial; and from all these “circumstances” determine where the preponderance lies—is not misleading as limiting their inquiry to the “circumstances.”
Ib.
5. *Consideration of Evidence.—Criminal Law.—Impeachment.*—An instruction in a criminal case, that the jury should consider the impeaching evidence in estimating the weight to be given the testimony of a witness, and also the fact, if they so find it, that the moral character of a witness has been successfully impeached, is proper.
Smith v. State, 288
6. *Murder.—Self-defense.*—Self-defense is sufficiently covered by a charge in a prosecution for murder, requiring that, before conviction, even in the lowest degree, each of the jury must be satisfied under the evidence of the existence of every ingredient of the crime, and convinced of defendant’s guilt beyond a reasonable doubt, “by the evidence of whatever class it may be, and considering all the facts and circumstances in the evidence as a whole,” and stating that the burden is on the prosecution to prove that the accused actually killed the deceased “under such circumstances as the law will not excuse,” where it was the only defense. *Ib.*
7. *Negligence. — Railroad. —* An instruction which, after stating that the negligence of defendant charged in the complaint consists in its engine being old and out of repair, and not equipped with a proper spark arrester, and also in being negligently and carelessly operated, states that the issue is whether or not the evidence and circumstances preponderate in favor of the proposition that the fire was caused by defendant’s negligence “in operating its engine in the manner alleged,” is not prejudicial error as confining the negligence to the mere operation of the engine, especially where the jury are elsewhere instructed that defendant would be liable if the fire was caused by the failure to use proper appliances, by suffering them to be out of order, or by negligently operating the engine, or other negligence.
White v. New York, etc., R. R. Co., 648
8. *Preponderance of Evidence.—Complaint.*—An instruction that if a careful consideration of the evidence and circumstances does not create an honest belief “that the allegations of the complaint are true” there is no preponderance for plaintiff, is not objectionable on the ground that it requires plaintiffs to prove all the allegations of their complaint, where from the other instructions the jury must have understood that the plaintiffs were simply required to prove their alleged cause of action by a preponderance of the evidence.
Ib.
9. *Impeached Witness, Testimony Of.* — An instruction that the jury have the right to reject all the testimony of a witness who has been impeached by proof that he has made contradictory and inconsistent statements out of court concerning material and relevant matters, is proper under section 515, R. S. 1894, providing for impeachment by such proof.
Ib.
10. *Sale. — Real Estate. — Misrepresentations. — Inspection. —*

Deceit.—An instruction that a purchaser has no right to rely upon the seller's representations as to quality of land, where he has a reasonable opportunity to examine and judge for himself, is not erroneous because it does not contain the condition that the defects complained of were such as an examination would have disclosed—especially where the jury are further instructed that the seller could not defeat a recovery for his fraud by showing an inspection, if such an inspection would not disclose the deceits practiced, or if by fraud the purchaser was induced to be less vigilant in his inspection. *Shepard v. Goben, 318*

INTENT.

See CRIMINAL LAW, 4.

INTEREST.

See DEMAND; PROMISSORY NOTE.

INTERROGATORIES TO JURY.

See APPELLATE PROCEDURE, 5.

Conveyance.—Undue Influence.—Deed.—An interrogatory upon the trial of an issue as to undue influence in procuring the execution of a deed, asking the jury to specifically find "how much influence was exercised," is properly rejected. *Raymond v. Wathen, 367*

INTERSTATE COMMERCE.

See MUNICIPAL CORPORATION, 2, 21.

JEOPARDY.

See CRIMINAL LAW, 1.

JUDGMENT.

See APPELLATE PROCEDURE, 3, 19, 21; INJUNCTION, 2, 3; QUIETING TITLE; REVIEW OF JUDGMENT; STATUTE, 4.

Drainage.—Finding.—Collateral Attack.—A finding of the board of commissioners in a proceeding for the establishment of a drain, that the notice required by section 5663, R. S. 1894, was given, and the judgment of affirmance in the circuit court, are conclusive as against a collateral attack, where some notice was in fact given.

Steele v. Empsom, 397

JURISDICTION.

See APPEAL, 1; CONFLICT OF LAWS, 1; INJUNCTION, 2.

Ohio River.—Courts of Indiana have concurrent jurisdiction of causes of action arising on the Ohio river, between this State and Kentucky, by virtue of the compact with Virginia, under which Kentucky became a State.

Memphis, etc., Co. v. Pikey, Admr., 304

JURORS.

See APPELLATE PROCEDURE, 9.

LACHES.

See COUNTY COMMISSIONERS, 2.

LARCENY.

See CRIMINAL LAW, 3, 4.

LIBEL.

Petition by Board of Childrens' Guardians for Custody of Child, —Privileged Act.—A petition under section 3189, R. S. 1894, authorizing the board of childrens' guardians to file a petition whenever they have probable cause to believe that the parents of any child less than fifteen years old are of "low and gross debauchery," is privileged and cannot be made the basis of a libel suit. (See note at end of opinion.) *Wilkins v. Hyde*, 260

LICENSE.

See PEDDLER ; MUNICIPAL CORPORATION, 1, 2, 21.

LIEN.

See SELLER'S LIEN ; TAX LIEN.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

MANDAMUS.

See GUARDIAN, FOREIGN.

1. *Witness. — Taxes. — Board of Equalization. — Preliminary Examination.*—The court has power by mandate to order a witness to answer questions asked him by a board of equalization on a preliminary examination, under R. S. 1881, section 6317, although it cannot direct what answer he shall make.
Satterwhite v. State, 1
2. *Witness. — Tax Board of Equalization. — Relief.*—The fact that a petition by a board of equalization, for a mandamus to compel a witness to testify before it, demands more than the petitioner is entitled to, does not deprive the petitioner of the right to any relief.
Ib.
3. *By a County Against the Auditor of Another. — Attorney's Fee.—Appeal.—Criminal Law.*—One county cannot maintain mandamus against the auditor of another county to enforce collection of a claim by the former county against the latter, for money paid an attorney for the State on appeal in a criminal action transferred to such former county from the latter, but such claim must, under section 7845, R. S. 1894, be presented to the commissioners of the latter county.
State, ex rel., v. Jamison, 679

MARRIED WOMAN.

See ESTOPPEL, 2, 3 ; HUSBAND AND WIFE ; REAL ESTATE ; TRUST.

MASTER AND SERVANT.

See COMMON CARRIER ; RAILROAD, 13.

1. *Assumed Risk.—Construction of Railroad Bridge.*—An employe engaged in building a railway bridge, who knows that wedges used in the construction of a track on which heavy timbers are conveyed are liable to slip out of place, assumes the risk of injury from that cause.
Bedford Belt R. W. Co. v. Brown, 659
2. *Assumed Risk.—Construction of Railroad Bridge.*—An employer is not liable for an injury to an employe engaged in constructing a railroad bridge, caused by the slipping out of a wedge used in the construction of a track on which to convey heavy timbers, where the employe participated in the construction of the track and in the placing and use of the wedges, and knew of their liability to slip out.
Ib.

3. *Contributory Negligence. — Construction of Railroad Bridge.* — An employe engaged in constructing a railroad bridge is guilty of contributory negligence in failing to observe whether a wedge used in the construction of a track on which heavy timbers are conveyed, is out of place, so as to render the track unsafe, before attempting to convey such timber over it, where he knows that the wedge is liable to slip out of place. *Ib.*

MAXIM.

See PRACTICE, 2.

MERGER.

See CONTRACT, 6.

MINES AND MINING.

See EVIDENCE, 8.

MISTAKE.

See APPELLATE PROCEDURE, 12; DEMAND; PROMISSORY NOTE.

MORTGAGE.

See ESTOPPEL, 2; PLEADING, 2; REAL ESTATE; RECEIVER, 1.

1. *Foreclosure. — Junior Mortgagee. — Default. — Right of Redemption.* — A junior mortgagee of land, served with summons in an action to foreclose the first mortgage, who permits judgment by default to be entered because she did not understand the nature of the summons is not entitled to relief, where she allows the year of redemption to pass by after learning of the sale three months after its occurrence, without exercising the right to redeem.

Becker v. Tell City Bank, 99

Foreclosure. — Judgment by Default. — Proceeding to Set Aside Default. — Essentials. — A judgment by default will not be set aside on the ground that it was obtained through the excusable neglect of defendant, unless she further shows that she had a good defense to the action. *Ib.*

MOTION TO MAKE MORE SPECIFIC.

See WILL, 4.

MUNICIPAL CORPORATION.

See ORDINANCE; PEDDLER.

1. *City. — License. — Hawkers and Peddlers.* — A city has power to pass an ordinance, requiring a license to hawk and peddle therein, under R. S. 1894, section 3541, empowering cities to "restrain" hawking and peddling. *City of South Bend v. Martin, 31*
2. *License. — Hawkers and Peddlers. — Interstate Commerce.* — An ordinance imposing a license on hawkers and peddlers, does not interfere with interstate commerce in the case of a peddler of chairs imported into the State before his employment begins, even though the sale by him is conditional and the title remains in the foreign owner. (See note at end of opinion.) *Ib.*
3. *City. — Common Council. — Removing City Attorney from Office. — Statute Construed.* — A common council of a city had the power, after the first Tuesday in May, 1894, to remove a city attorney from office and appoint his successor, whether he was in office at the time of the passage of R. S. 1894,

section 3476, or not, under the provision that city attorneys shall hold office for four years, subject to removal by the council at its pleasure, after the first general election on the first Tuesday in May, notwithstanding the provision extending the terms of city attorneys in office at the time of the passage of the act, until the first Monday of September, 1894. *State, ex rel., v. Wilson, 102*

4. *City Attorney. — Right of Council to Abolish Such Office. — Statute Construed.* — A city attorney in office at the time of the passage of R. S. 1894, section 3476, extending the term of attorneys in office at that time, cannot, by the performance of the condition of extension, prevent the abolition of such office before the expiration of the extended term, by the common council, under the authority implied from the fact that the creation of the office is left to its discretion.

Goodwin, Clerk, etc., v. State, ex rel., 117

5. *City Attorney. — Removal Of. — Statute Construed.* — A common council of a city had the power after the first Tuesday in May, 1894, to remove a city attorney from office, and appoint his successor, whether he was in office at the time of the passage of R. S. 1894, section 3476, or not, under the provision that city attorneys shall hold office for four years, subject to removal by the council at its pleasure, after the first general election on the first Tuesday in May, notwithstanding the provision extending the terms of city attorneys, in office at the time of the passage of the act, until the first Monday of September, 1894. *Ib.*

6. *Sewer. — Street Improvement. — Assessment.* — The construction of a sewer under a street as part of a paving improvement, is within the authority to improve streets, conferred by a city charter upon the board of public works, although authority so conferred is limited by a provision that the cost of street improvements shall be estimated according to the whole length of the street, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement per running foot, and the cost of constructing drainage sewers as such is required to be assessed according to benefits to, or the area of, the lands affected, where the sewer is a necessary part of the street improvement, and is not to be used to drain the abutting property.

Kirkland v. Board, etc., 123

7. *Street Improvement. — "Resident Freeholders." — Statute Construed.* — "Resident freeholders" within the meaning of a charter providing that after the confirmation of an original resolution for a street improvement, the same shall be conclusive on all persons, unless within ten days thereafter "two-thirds of all the resident freeholders upon the street" remonstrate against it, means resident freeholders upon the street, and not simply residents of the city, owning property on the street. *Ib.*

8. *Town Ordinance. — Reasonableness Of. — Courts.* — The courts will not inquire into the wisdom or reasonableness of an ordinance which a town has power to pass and enforce, unless it violates some constitutional provision. *Rund v. Town of Fowler, 214*

9. *Town. — Estoppel. — Slaughter House.* — A town is not estopped to claim that a slaughter house within the corporate limits violates an ordinance, merely because its location was directed and consented to by the town trustees, unless such direction or consent was taken by corporate action in some method recognized by law. *Ib.*

10. *Town Ordinance. — Slaughter House. — Nuisance.* — A town ordinance, declaring that slaughter houses within the corporate limits shall be deemed public nuisances, and making it unlawful to

maintain any within such limits, is authorized by section 4357, R. S. 1894, giving the board of trustees power to declare what shall constitute a nuisance and to direct the location of slaughter houses. *Ib.*

11. *Slaughter House. — Nuisance. — Ordinance.* — A slaughter house, erected or conducted in violation of an ordinance prohibiting its maintenance within the corporate limits of the town, becomes a nuisance, although it would not be such in the absence of such ordinance. *Ib.*
12. *City. — Changing Grade of Street. — Evidence.* — The establishment by a city of a prior street grade, essential to the right of a property-owner to recover damages for an alleged change of grade, should be shown by proof of authoritative acts and proceedings of the common council, in adopting a former town grade, or in designating a new grade. *City of Huntington v. Griffith, 280*
13. *City. — Annexation of Territory. — Lands Not Adjacent.* — A statute giving a city council jurisdiction to annex adjacent lands on the written consent of the owners gives the council no jurisdiction to annex lands on the petition of owners whose lands are not adjacent. (See note at end of opinion.) *Forsythe v. City of Hammond, 505*
14. *City. — Annexation of Territory. — Legislative Character. — Judicial Examination.* — The legislative character of the function of annexation of territory to a city does not preclude judicial examination and decision on questions as to the preliminary steps and the truth and sufficiency of the petition for annexation. *Ib.*
15. *Town. — Lighting Expense. — Payable Out of General Fund.* — The expense of lighting a town may be paid out of the current revenues of the town, without making a special levy to provide funds for that purpose, even though the effect of such payment is to postpone judgment or other creditors of the town. *Foland v. Town of Frankton, 546*
16. *Town. — Lighting Contract. — Debt. — Statute Construed.* — A contract for lighting a town, the lights to be paid for annually as furnished, does not create a debt within the meaning of section 4377, R. S. 1894, requiring that an indebtedness shall not be incurred except on petition of a majority of the owners of the taxable real estate of the town. (See note at end of opinion.) *Ib.*
17. *Contract for Lighting Streets. — Debt.* — A contract for gas to light the streets of a town for a specified time does not create an indebtedness within the meaning of section 4377, R. S. 1894, prohibiting any incorporated town from incurring any debt without the presentation to the board of trustees of a petition. *Seward v. Town of Liberty, 551*
18. *Town. — Annexation of Territory. — Sufficiency of Reasons Not Reviewable on Appeal. — County Commissioners.* — The sufficiency of the reasons stated in a petition for the annexation of territory to a town cannot be considered upon appeal, at least in the absence of a plain abuse of the discretion necessarily vested in the county board of commissioners, by the omission of the statute to prescribe what reasons shall be set forth. *Windfall Mfg. Co. v. Emery, 456*
19. *Annexation of Territory. — Evidence. — Remonstrant. — Use of Streets. — School Children in Such Territory.* — In a proceeding under statutes for the annexation of territory to a town, it may be shown that the office of the remonstrant is within the town, that the streets of the town are used in the transportation of the products manufactured by him within the territory in question that other factories in the same territory are in prospect and that children residing in such territory attend the schools in the town. *Ib.*

20. *City. — Indebtedness. — Constitutional Limitation.*—The constitutional limitation of indebtedness is not violated by a city in purchasing a fire-alarm telegraph, when there is money on hand and appropriated for fire purposes sufficient to pay the cost thereof, although the city is already indebted for more than the constitutional amount, and it may not be a wise thing for the common council to expend the fire appropriation in this way. (See note at end of opinion.) *Brashear v. City of Madison*, 685

21. *City Ordinance Against Peddling Without License.—Distributing Agent.—Interstate Commerce.*—A city ordinance prohibiting peddling without a license is an unlawful interference with interstate commerce as to a salaried distributing agent of a publishing firm in another State, where orders for books in several localities are sent to such firm by another salaried agent, and on being received by the latter are repacked and shipped to various localities for distribution. (See note at end of opinion.) *City of Huntington v. Mahan*, 695

MURDER.

See APPELLATE PROCEDURE, 10 ; INSTRUCTIONS TO JURY, 6.

NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE; INSTRUCTIONS TO JURY, 7; SCHOOL CORPORATION.

NEW TRIAL.

See APPELLATE PROCEDURE ; ASSIGNMENT OF ERRORS, 1.

1. *Cause For.—Evidence as Upon Discovery. — Medical Examination.—Order of Court.*—Alleged errors in requiring plaintiff to give testimony before the trial as upon discovery, and to submit to a medical examination out of court before the trial, are not "errors of law occurring at the trial," which may be presented on motion for a new trial.

Pfaffenback v. Lake Shore, etc., R. W. Co., 246

2. *Newly Discovered Evidence. — "Faulty Memory."* — A new trial for newly discovered evidence is properly refused, where the only excuse for failing to obtain such evidence on the trial was the applicant's faulty memory. *Ib.*

NEW TRIAL AS OF RIGHT.

See RECEIVER, 7.

NOTICE.

See APPEAL, 1, 2 ; APPELLATE PROCEDURE, 11, 12 ; DRAINAGE, 2 ; EVIDENCE, 8 ; PRACTICE, 2 ; RAILROAD, 6, 9 ; RECEIVER, 5, 6 ; SALE, 2 ; SUMMONS ; TAXES.

NUISANCE.

See MUNICIPAL CORPORATION, 10, 11.

OFFICE AND OFFICER.

See SCHOOL CORPORATION.

1. *County Sheriff. — Eligibility. — Service Limited to Four Years in Any Period of Six. — Construction.* — One appointed sheriff in the place of the officer regularly elected for a

second term of two years, who died after qualifying is not ineligible to hold after the end of such term, under Const., Art. 6, section 2, providing that no person shall be eligible to such office "more than four years" in any period of six years, and Art. 2, section 11, providing that an appointment *pro tempore* to any office shall not be reckoned a part of the term in cases providing that an office shall not be filled by the same person more than a certain number of years continuously. *State, ex rel., v. Linkhauer, 94*

2. *Sheriff. — Vacancy. — Appointee. — Tenure.* — No vacancy occurs in the office of sheriff, authorizing the appointment of another person, where the duly elected sheriff dies before taking oath of office, and one appointed to complete his predecessor's term of office is holding such office under R. S. 1894, section 7579, authorizing the filling of vacancies in such office by appointments which shall expire when a successor "is elected and qualified." (See note at end of opinion). *Ib.*

3. *County Sheriff. — Power of County Commissioners to Elect a Successor to an Appointee.* — A board of county commissioners has no authority to elect a successor to an appointee to the office of sheriff, under R. S. 1894, section 7579, providing that such appointment shall expire when a successor is elected and qualified, who shall be "elected at the next * * * general election." *Ib.*

OHIO RIVER.

See CONFLICT OF LAWS, 1; JURISDICTION.

OPINION EVIDENCE.

See EVIDENCE, 18, 19.

ORDINANCE.

See INJUNCTION, 6; MUNICIPAL CORPORATION, 8, 10, 11, 21.

PARTIES.

See ABATEMENT OF ACTION; APPEAL, 3; APPELLATE PROCEDURE, 11, 12, 29; PLEADING, 11, 13; RECEIVER, 2, 3; WILL, 3, 6.

PASSENGER.

See COMMON CARRIER; INSTRUCTIONS TO JURY, 2.

PATENT RIGHT.

See CONTRACT, 2.

PAYMENT.

See DEPOSITION, 2.

PEDDLER.

See MUNICIPAL CORPORATION, 1, 2, 21.

Definition Of. — License. — Municipal Corporation. — City. — One engaged in selling chairs within a city by going personally from house to house, selling the chairs and delivering them at the time of the sale, is a peddler within an ordinance requiring peddlers to obtain a license. *City of South Bend v. Martin, 31*

PENALTY.

See DEFENSE; STATUTE, 4; STATUTE OF LIMITATIONS; STATUTORY CONSTRUCTION, 1, 2, 5.

PERSONAL INJURY.

See EVIDENCE, 8; RAILROAD, 2, 3, 4, 5, 13; SCHOOL CORPORATION.

PERSONAL PROPERTY.

See SALE, 1.

PHYSICIAN.

See CONTRACT, 3, 4, 5.

PHYSICIAN AND PATIENT.

See EVIDENCE, 9.

PLEADING.

See AMENDMENT OF PLEADING; ANSWER; COMPLAINT; COUNTERCLAIM;
CROSS-COMPLAINT; DEMURRER; IDEM SONANS; SET-OFF.

1. *Complaint for Review of Judgment.—Exhibit.*—A complaint for review of a judgment, under R. S. 1894, section 627, must set forth as an exhibit a complete transcript of the judgment, or so much thereof as is necessary to fully present the error complained of. *Michener v. Springfield, etc., Co., 130*
2. *Answer, When Demurrable.—Infancy.—Note.—Mortgage.*—An answer, setting up defendant's infancy as a full defense, both to a note and mortgage, is demurrable, where it is a defense only to the note. *United States, etc., Co. v. Harris, 226*
3. *Complaint, When Not Demurrable.—Relief.*—A pleading, in the nature of a complaint, is not demurrable, where it states facts showing that plaintiff is entitled to any of the relief demanded. *Ib.*
4. *Filing Amended Pleading.—Waiver.*—The filing of an amended pleading waives any error committed in rulings upon such pleading. *State, ex rel., v. Jackson, 259*
5. *Filing Amended Pleading.—Waiver.*—The filing of an amended pleading waives any error in sustaining a demurrer to the original pleading. *Gowen v. Gilson, 328*
6. *Demurrer.—Complaint Attacking Invalidity of Deed.—Two Grounds Stated in One Paragraph.*—A demurrer to a complaint attacking the validity of a deed will be overruled, where the alleged invalidity is based upon two grounds set forth in a single paragraph, treated as such by the parties, if one of the grounds set forth sufficiently state a cause of action. *Raymond v. Wathen, 367*
7. *Set-Off.—Counterclaim.—Partial Answer.*—A plea setting up a set-off or counterclaim to part of the claim sued on is not bad in failing to respond to the balance, although it is directed to the entire cause of action. *Stotsenburg, Admr., v. Fordice, 490*
8. *Set-Off.—Damages for Detention of Real Estate.—Quieting Title.*—Possession of the premises in question, with damages for the detention thereof, may be counterclaimed under section 853, R. S. 1894 (section 850, R. S. 1881), as "arising out of or connected with the cause of action," in an action to quiet title to real property, where the defendant denies title in the plaintiff and alleges ownership in himself. *Gillenwaters v. Campbell, 529*
9. *Complaint.—Demurrer.—Misjoinder of Causes.*—A demurrer will not lie to a complaint on the ground "that several causes of action have been improperly joined," simply because one of the several paragraphs of one cause of action asks for relief which could not be granted in a cause of action which could be properly

joined, where the several paragraphs taken together allege a cause of action which could be properly joined, and ask appropriate relief thereunder. *Ib.*

10. *Complaint.—Injunction.—Town.—Contract for Lighting.*—An allegation in the complaint in an action to restrain a town from entering into a contract for lighting its streets, "that the town will not have money to meet its indebtedness when the same matures above the amounts necessary for the necessary running expenses of said town, and will not receive from the present levy sufficient funds to pay said indebtedness, and cannot make a levy in time to pay the same as it matures," is insufficient, as a mere conclusion. *Foland v. Town of Frankton, 546*
11. *Complaint.—Defect of Parties Plaintiff.—Waiver.—Plea in Abatement.*—A defect of parties plaintiff not apparent on the face of the complaint is waived, unless advantage is taken thereof by a plea in abatement. *Moore v. Harmon, 555*
12. *Plea in Abatement, in Bar.—Verification.—Practice.*—An answer in abatement must be verified, and precede an answer in bar, and cannot be pleaded therewith, and the issues thereon must be tried first and separately. *Ib.*
13. *Agreement that All Defenses Shall Be Competent Under General Denial.—Plea in Abatement.—Practice.—Defect of Parties Plaintiff.*—An agreement by the parties that the defendant may have all competent defenses under a general denial does not dispense with the necessity for a plea in abatement to make a defect of parties plaintiff not appearing on the face of the complaint available, as it will be construed to embrace only such defenses as are competent in bar, especially as under the code pleas in abatement cannot be joined with those in bar. *Ib.*
14. *Complaint.—Easement by Prescription.—Private Way.—Title.*—A complaint alleging that plaintiffs are the owners of certain land; and that the only means of access thereto is over a specified road; and that the same has been used by plaintiffs and the grantors for fifty years continuously; and that during all such time such road has been and still is an easement and right of way connected with plaintiffs' land, sufficiently alleges their title to such road to withstand demurrer. *Mitchell v Bain, 604*
15. *Complaint.—Easement.—Adverse User.*—An allegation that plaintiffs and their grantors have for fifty years continuously used a private road under a claim of right, as a means of access to their land, with defendant's knowledge and acquiescence, and without objection on his part, sufficiently alleges that such use was adverse. *Ib.*
16. *Complaint.—Action to Set Aside Conveyance as Fraudulent.—Husband and Wife.*—A complaint in an action to set aside as fraudulent a conveyance to the grantor's wife, alleging that at the time of the conveyance the latter knew of her husband's indebtedness and of his purpose to defraud his creditors, and that she received the conveyance with the purpose to aid him in such fraud, is sufficient without an allegation that there was no consideration. *Pierce v. Hower, 626*
17. *Complaint To Set Aside a Conveyance as Fraudulent.*—A complaint in an action to set aside a conveyance as fraudulent, alleging that at the time of the said conveyance the grantor had no other property subject to execution, "nor has he had from the time of said conveyance until now, for the payment of said judgment," is sufficient, after judgment, to show that such grantor did

not at the commencement of the action have sufficient property subject to execution to pay the claim. *Ib.*

18. *Complaint.—Review of Judgment.—Tax Lien.*—A complaint in an action to review a judgment finding that defendant has a valid and paramount lien for taxes on land sold to him in 1887, for delinquent taxes for 1886 and previous years, alleging that delinquent taxes for a specified amount were illegally placed on the city tax duplicate for 1881, is demurrable where it fails to show that such illegal taxes were a part of the taxes for which the land was sold in 1887. *Jones v. City of Tipton, 643*

19. *Facts Peculiarly Within the Knowledge of Opposite Party.*—A pleading need not allege facts peculiarly within the knowledge of the party against whom they should be pleaded, and which are not accessible to the pleader, but should state that such is the case. *Brashear v. City of Madison, 685*

POLICE POWER.

See CONSTITUTIONAL LAW, 2, 3.

POSSESSION.

See SALE, 2.

PRACTICE.

See AMENDMENT OF PLEADING; APPELLATE PROCEDURE, 24; DRAINAGE, 10; EVIDENCE, 2; MOTION; PLEADING, 12, 13.

1. *Motion.—Procedure.*—A mover, under a notice of a motion to be made at chambers on a day and hour specified, or as soon thereafter as counsel can be heard, must proceed within such reasonable time after the time fixed in the notice and within the convenience of the judge as will enable his adversary to be present and be heard without attending through protracted periods of delay and uncertainty. *Stephens v. Kaga, 528*
2. *Maxim.—Notice.*—Every one is entitled to his day in court, and no one shall be condemned unheard. *State, ex rel., v. Jamison, 679*

PRESCRIPTION.

See PLEADING, 14; SPECIAL FINDING, 3.

PRESUMPTION.

See APPELLATE PROCEDURE, 4, 27; EVIDENCE, 17; RAILROAD, 4, 11; SPECIAL FINDING, 3; WILL, 8.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See ESTOPPEL, 2.

PRIVATE WAY.

See PLEADING, 14; SPECIAL FINDING, 3; SURFACE WATER.

PROMISSORY NOTE.

See DEMAND; ESTOPPEL, 2; PLEADING, 2; REVIEW OF JUDGMENT, 1.
Recovery of Interest Paid in Excess of Contract Rate.—Mistake of Fact.—Assumpsit.—Payment of interest on a note, in excess of the

contract rate, under a mistake of fact, may be recovered back whether or not the mistake was mutual.

Stotsenburg v. Fordice, 490

PROSECUTING ATTORNEY.

See STATUTE, 4.

PUBLIC IMPROVEMENT ASSESSMENT.

See MUNICIPAL CORPORATION, 6.

PUBLIC POLICY.

See CONTRACT, 7.

PUBLIC PROPERTY.

See EMINENT DOMAIN.

QUIETING TITLE.

See PLEADING, 8 ; SPECIAL FINDING, 1.

Answer.—Judgment.—Collateral Attack.—An answer in an action to quiet title, alleging that the judgment upon which the plaintiff's title is based was procured by fraud upon the court and minor defendants, is a direct, and not a collateral attack on such judgment.

Kirby v. Kirby, 419

RAILROAD.

See AID TO RAILROAD ; CONSTITUTIONAL LAW, 4 ; COUNTY COMMISSIONERS, 1, 2 ; DRAINAGE, 8 ; EVIDENCE, 23 ; INSTRUCTIONS TO JURY, 2, 7 ; MASTER AND SERVANT, 1, 2, 3 ; STATUTE, 4.

1. *Evidence. — Passenger Ticket, System of Issuing and Selling.—Number.—Date.*—Evidence that defendant railway company, which was sued for personal injuries alleged to have been received on a specified train, had a system of issuing and selling tickets by consecutive numbers, of stamping thereon the dates of their sale, and for the return and preservation of tickets canceled by conductors, and that the tickets returned as sold at the place where plaintiff's ticket was bought and dated on the day in question were taken up by other conductors than the one with whom plaintiff claimed to have ridden—is admissible to show that he was not on such train.

Pfaffenback v. Lake Shore, etc., R. W. Co., 246

2. *Complaint. — Insufficient Allegation. — Personal Injury.* — A complaint alleging that a brakeman saw plaintiff in a perilous position in front of a moving train, and immediately "signalled the engineer to stop the train, and took off his hat and swung it and hallooed at him," is insufficient to show that the engineer knew that any one was in danger.

Evans v. Pittsburgh, etc., R. W. Co., 264

3. *Personal Injury.—Liability.—Placing Foot on Rail in Front of Wheel.*—A railroad company is not liable for an injury to one who negligently places his foot on a railroad track a short distance from a train, unless its employees who properly started such cars, in the exercise of their duty, knew of his danger and could have stopped the train in time to avoid the injury.

Ib.

4. *Presumptive Evidence. — Person Run Over by Train and Killed.*—A person run over by a train, while walking upon the track, will be presumed to have observed the approach of the train, or to have been able to observe it if he had listened and looked, where the train was in fact observable fifteen or twenty rods away.

Lamport, Admx., v. Lake Shore, etc., R. R. Co., 269

5. *Personal Injury. — Burden of Proof. — Trespasser. — Care.*—
The burden is upon plaintiff in an action to recover for the death of a person killed by a train, while walking on a railroad track, to show that the deceased was in the exercise of reasonable care, whether he was a trespasser or not. *Ib.*
6. *Consolidation with Corporations of Other States.—Notice of Meetings of Stockholders.*—It is not essential to the validity of the determination of a railroad company in Indiana to consolidate with other companies in other States that the stockholders should be called together by the notice and conduct their meetings by the methods, prescribed by the laws of such other States, under sections 5257 and 5262, R. S. 1894, providing for consolidation of railroad corporations in Indiana with railroad corporations of other States, upon such terms as may be mutually agreed upon in accordance with the laws of the adjoining States with whose roads connections are thus formed.
Bradford v. Frankfort, etc., R. R. Co., 383
7. *Directors. — De Facto Officers. — Unconstitutional Act.* — Persons elected directors of a railroad corporation under an unconstitutional act, are *de facto* officers as to acts done by them under color of their office before the unconstitutionality of the act has been declared. (See note at end of opinion.) *Ib.*
8. *Stockholder. — Consolidation. — Validity Of. — Estoppel.* — A stockholder of a constituent railroad corporation, who participated in the acts of the corporation, by which it agreed to and effected a consolidation with other companies, is estopped to deny the validity of the consolidation. *Ib.*
9. *Consolidation. — Estoppel. — Notice.* — The effect of participation in proceedings for the consolidation of railroad companies, and acquiescence in such consolidation, to estop a constituent company to deny the validity of the consolidation as against the public, purchasers from the consolidated company, and mortgage bondholders of the latter, cannot be avoided because of a notice given by one of its stockholders at the time of its sale, asserting the invalidity of the consolidation, but not pointing out any defects other than those which both he and the company were already estopped to assert. *Ib.*
10. *Consolidation. — Estoppel.* — A constituent railroad corporation is estopped to question the validity of a consolidation formed by it, with other corporations, where it participated in every step essential to the creation of a *de facto* corporation, by consolidation, and has stood by for years, permitting mortgage foreclosures as upon its property, permitting purchasers to acquire supposed titles, and new corporations to form, to purchase, to consolidate with still other corporations, and large sums to be expended in improving the road, and has suffered mortgage bonds to be issued and put upon the market—all without question. *Ib.*
11. *Consolidation.—Presumptive Evidence.*—It will be presumed, in an action attacking the validity of a consolidation of railroad corporations, that the requisite stock to effect such consolidation was voted by a constituent corporation, where no issue in that respect is raised, under section 5147, R. S. 1894, giving directors of railroad companies power to enact by-laws governing the disposition of stock, property, and business of the company. *Ib.*
12. *Blackboard Statute.—Time for Necessary Provisions for Observance of Requirements.*—Railroad companies were not entitled to any time after the proclamation of the act of March 9, 1889, which took effect sixty days after its approval, to make the neces-

sary provision for the observance of its requirements as to noting upon blackboards to be maintained at stations whether schedule trains are on time, and, if late, how much, as it is provided that compliance shall begin "immediately after taking effect of the act."
Pennsylvania Co. v. State, 423

13. *Employe. — Personal Injury. — Defective Track. — Assumed Risk. — Master and Servant.*—A railroad employe employed on a construction train to haul cross-ties and material over an uncompleted track in the manner customary in the construction of railroads assumes the risk incident to such employment, and cannot recover for an injury caused by a derailment at a place which is not different from the other parts of the track.

Evansville, etc., R. R. Co. v. Henderson, 596

14. *Highway Crossing. — Contributory Negligence. — Damages.*—One who drives at a trot towards a railway crossing, without looking until his horse's head runs against a passenger coach, which he might have seen before reaching the track if he had looked, is guilty of such contributory negligence as will prevent a recovery.

Engrer v. Ohio, etc., R. W. Co., 618

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Conveyance. — Disaffirmance of Mortgage by Infant Feme Covert. — Restoring Consideration. — Statute Construed.—The term "conveyance of real estate," as used in sections 3364 and 3365, R. S. 1894, relating to conveyances of land by infant *feme covert*s, comprehends mortgages of real estate as well as deeds of conveyance; and before such *feme covert* can disaffirm her mortgage she must restore the consideration received, although she may disaffirm the note secured by the mortgage, thus avoiding personal liability.

U. S. Saving Fund, etc., Co. v Harris, 226

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See APPELLATE PROCEDURE, 10; CRIMINAL LAW, 2.

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See APPELLATE PROCEDURE, 19.

1. *Amendment of Application For. — Foreclosure of Mortgage. — Expiration of Time for Redemption.*—An application by the assignee of a certificate of sale under foreclosure, for the appointment of a receiver to collect rents and profits and apply the same to the payment of mortgages, may be amended by setting up facts entitling the plaintiff to the relief sought, after the reversal of an order appointing such receiver, although the period of redemption has expired in the meantime, where there is a controversy between the plaintiff and the mortgagor over the amount in the hands of the receiver.
Stoffel v. Sellers, 301
2. *Nonresident Plaintiff. — Overruling Motion for Bond for Costs.*—An appointment of a receiver upon the application of plaintiff is not invalid because of the erroneous overruling of a previous motion by defendant to require plaintiff as a nonresident to file a bond for costs, under section 598, R. S. 1894.
Galloway v. Campbell, 324
3. *To Operate Oil Wells Pending Action for Specific Performance. — Nonresident Defendants.*—The appointment of a receiver to operate oil wells pending an action for the specific performance of

- a contract to assign a lease is authorized, where defendant, who is a nonresident without property in the State, save the machinery on the land, is operating the wells and selling the product. *Ib.*
4. *Leave of Court to Bring Action.—Sufficiency of Complaint.*—The complaint in an action by a receiver, in his own name, to sufficiently state a cause of action, must show by direct and positive averments, that leave of court to institute and prosecute the action has been first obtained. *Hatfield v. Cummings, 350*
5. *Affidavit. — Sufficiency of Complaint. — Temporary Pending Suit.—Without Notice.*—A liberal construction will be given to a complaint in determining its sufficiency so far as it relates to the appointment of a temporary receiver pending the action, but it must state a cause for such appointment; and if the application is made without notice, the cause for an appointment without notice must appear either in the verified complaint or by affidavit, under section 1244, R. S. 1894, providing that a receiver shall not be appointed without notice of the application to the adverse party, except upon sufficient cause shown by affidavit. *Sullivan, etc., Co. v. Blue, 407*
6. *Appointment Without Notice.—Insufficient Cause.—Affidavit.*—Sufficient cause within the meaning of section 1244, R. S. 1894, forbidding the appointment of a receiver without notice to the adverse party, except upon sufficient cause shown by affidavit, is not shown where it affirmatively appears that notice could easily have been given, and it does not appear, either by affidavit or by verified complaint, that irreparable or other damage would have resulted from giving the same. *Ib.*
7. *To Harvest and Sell Crops. — New Trial as of Right. — Ejectment.*—A receiver to harvest and sell crops will not be appointed pending the statutory new trial in an ejectment action, as the undertaking to pay all costs and damages which shall be recovered in the action, required by section 1076, R. S. 1894, as a condition of a new trial, affords an adequate remedy at law if damages for conversion of the crops would be recoverable in the action, and, if not recoverable, the remedy would be improper. *Stephens v. Kaga, 523*

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1. *Guarantor.—Indorser.—Promissory Note.—Statute Construed.*—An accommodation guarantor or indorser of a note is entitled to review a judgment against him, under R. S. 1894, section 627, without reviewing the judgment against the makers, where after the judgment against him the makers defeated the claim against them in the same action, on the ground of failure of consideration.

Michener v. Springfield, etc., Co., 130

2. *Complaint.—Material New Matter.—Taxes.*—Reasonable diligence in discovering the facts of the illegality of delinquent taxes spread upon a city tax duplicate nine years before the rendition of a judgment sought to be reviewed is not sufficiently averred by an allegation in the complaint that plaintiff made search for the facts, but could not find them in the city or county offices.

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1. *For Cash. — Personal Property. — Constructive Delivery. — Seller's Lien.—Resale by Purchaser.*—A seller for cash of lumber which remains in his lumber yard is not deprived of his lien for the purchase price as against a purchaser from the buyer, by setting it apart in such manner as to constitute a constructive delivery sufficient to vest title in the buyer. *Perrine v. Barnard, 448*
2. *Subpurchaser.—Notice.—Lien of First Vendor.—Possession.*—A subpurchaser who knows that lumber purchased by his seller is in the yard and apparently in the possession of the original seller is bound to take notice that the latter is claiming a lien thereon for unpaid purchase money. *Ib.*

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Pittsburgh, etc., R. W. Co. v. O'Brien, 218
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act, does not render the amendatory act unconstitutional under Const. Art. 4, section 19, requiring every act to embrace but one subject, which shall be expressed in the title.

Citizens' St. R. R. Co. v. Haugh, 254

2. *Amending Unconstitutional Act so as to Remedy Defect.—Fees and Salaries. — Case Modified.* — An amendment of a statute relating to fees and salaries of officers, which was unconstitutional as to certain officers because it did not apply to all the counties in the State, may be made by a subsequent Legislature so as to extend provisions in respect to those officers to all the counties, and thereby remedy the constitutional objections. *State, ex rel., v. Boice, 140 Ind. 506, modified. Walsh, Treas., v. State, ex rel., 357*
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Pennsylvania Co. v. State, 428
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2. *Signature.—Mark.—Wrong Christian Name.*—A will signed by the testator by making his mark, and duly probated as his will, is not insufficient because another than his given name is written thereon. (See note at end of opinion). *Ib.*
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7. *Evidence.—Testimony of Contestant.*—A party to a will contest cannot, under R. S. 1894, section 507, testify respecting things which were not open to the observation of all the friends and acquaintances of the testator. *Ib.*
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4. *Husband and Wife. — Arson. — Party Injured.* — A husband or wife may testify in criminal prosecutions against the other, when he or she is "the party injured by the offense committed," whether the evidence involves communications between them or not, under the civil code, providing that the husband and wife shall be incompetent to testify as to communications made to each other, and sections 1865 and 1867, R. S. 1894, providing that the rules governing the competency of witnesses in civil cases shall govern in criminal cases except as otherwise provided, and that a party injured by the offense committed shall be a competent witness. *Ib.*
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